Supreme Court, U.S.
FILED
07-402 SEP 18 2007
OFFICE OF THE CLERK

No. 07-

IN THE

Supreme Court of the United States

FOOD EXPRESS, INC., a California corporation,

Petitioner,

v.

LARIE E. BOSTAIN and LAURIE JO BOSTAIN, husband and wife,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a state applies its overtime wage law to hours worked by interstate truck drivers in other states, does the extraterritorial application of that law violate the Commerce Clause of the United States Constitution?

2. In applying Washington's overtime wage law to hours worked by interstate truck drivers in other states, did the Washington Supreme Court improperly import the test for undue burden on interstate commerce, into the extraterritoriality analysis of the Commerce Clause of the United States Constitution?

3. Where a state applies its overtime wage law to hours worked by drivers in other states, does that law impose an undue burden on interstate commerce, offending the Commerce Clause of the United States Constitution?

4. When a state applies its overtime wage law to interstate truck drivers compelling motor carriers to modify the routes and hours of such drivers to avoid the added financial burden of such overtime, does the law violate the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501(c)(1) ("FAAAA"), which preempts all state laws relating to the prices, routes, or services of a motor carrier?

STATEMENT PURSUANT TO RULE 29.6

Food Express, Inc. has no parent corporations and no publicly owned company owns 10% or more of Food Express' stock.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Appendices	v
Table of Cited Authorities	vi
Opinion Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Petition	5
A. Summary of Reasons	5
B. Washington's Overtime Wage Law Violates the Commerce Clause As It Applies to Hours Worked by Interstate Truck Drivers in Other States	7
(a) Extraterritorial Application	9

Contents

Page

(b) The Washington Court Conflated This Court's Undue Burden and Extraterritoriality Analyses 14

(c) Washington's Overtime Wage Law Fails the *Pike* Balancing Test 16

C. The FAAAA Preempts Wash. Rev. Code § 49.46.130 If It Applies to Hours Worked in Other States 20

Conclusion 25

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Supreme Court Of The State Of Washington Filed March 1, 2007 ... 1a

Appendix B — Opinion Of The Court Of Appeals Of Washington, Division 2 Dated May 17, 2005 ..... 44a

Appendix C — Amended Final Order And Judgment Of The Superior Court Of Washington For Clark County Dated And Filed February 19, 2004 .... 58a

Appendix D — Order Of The Supreme Court Of Washington Denying Motion For Reconsideration Filed June 20, 2007 ..... 65a

TABLE OF CITED AUTHORITIES

Page

United States Supreme Court Cases:

American Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n, 545 U.S. 429, 125 S. Ct. 2419, 162 L.Ed.2d 407 (2005) 8, 14

Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 79 S. Ct. 962, 3 L.Ed.2d 1003 (1959) 16

Bigelow v. Virginia, 421 U.S. 809 (1975) 9

BMW of North America, Inc. v. Gore, 517 U.S. 599 (1996) 9

Bonaparte v. Tax Court, 104 U.S. 592 (1881) 9

Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 97 S. Ct. 599, 50 L.Ed.2d 514 (1977) 8

Brown–Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 106 S. Ct. 2080, 90 L.Ed.2d 552 (1986) 9, 12, 14, 15

Page

California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 117 S. Ct. 832, 136 L.Ed.2d 791 (1997) 22, 24

CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) 10, 11, 13

Edgar v. MITE Corp., 457 U.S. 624, 102 S. Ct. 2629, 73 L.Ed.2d 269 (1982) 9, 14

Egelhoff v. Egelhoff, 532 U.S. 141 (2001) 22, 23

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 7

H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 69 S. Ct. 657, 93 L.Ed. 865 (1949) 8

Healy v. Beer Inst., Inc., 491 U.S. 324, 109 S. Ct. 2491, 105 L.Ed.2d 275 (1989) 9, 12, 14, 17

Hughes v. Oklahoma, 441 U.S. 322, 99 S. Ct. 1727, 60 L.Ed.2d 250 (1979) 8

Cited Authorities

Page

Kassel v. Consol. Freightways Corp. of Delaware,
450 U.S. 662, 101 S. Ct. 1309,
67 L.Ed.2d 580 (1981) 16

Levinson v. Spector Motor Serv.,
330 U.S. 649, 67 S. Ct. 931,
91 L.Ed. 1158 (1946) 20

Morales v. Trans World Airlines, Inc.,
504 U.S. 374, 112 S. Ct. 2031,
119 L.Ed.2d 157 (1992) ..... *passim*

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,
514 U.S. 645 (1995) 22, 23

Oklahoma Tax Comm'n v. Jefferson Lines, Inc.,
514 U.S. 175 (1995) 8

Pike v. Bruce Church, Inc.,
397 U.S. 137, 90 S. Ct. 844,
25 L.Ed.2d 174 (1970) ..... *passim*

Raymond Motor Transp., Inc. v. Rice,
434 U.S. 429, 98 S. Ct. 787,
54 L.Ed. 664 (1978) 16

Rodriguez de Quijas v. Shearson/Am. Express,
490 U.S. 477 (1989) 23

Page

Shaw v. Delta Air Lines, Inc.,
463 U.S. 85 (1983) 22

United Haulers Ass'n, Inc.
v. Oneida-Herkimer Solid Waste Mgmt. Auth.,
__ U.S. __, 127 S. Ct. 1786 (2007) 8

Willson v. Black-Bird Creek Marsh Co.,
27 U.S. (2 Pet.) 245 (1829) 7

Federal Cases:

Abdu-Brisson v. Delta Airlines, Inc.,
128 F.3d 77 (2d Cir. 1997) 24

Am. Booksellers Found. v. Dean,
342 F.3d 96 (2d Cir. 2003) 15

ACLU v. Johnson,
194 F.3d 1149 (10th Cir. 1999) 15

Californians for Safe & Competitive
Dump Truck Transp. v. Mendonca,
152 F.3d 1184 (9th Cir. 1998), *cert. denied*,
526 U.S. 1060 (1999) 24

Carolina Trucks & Equip., Inc.
v. Volvo Trucks of N. Am., Inc.,
492 F.3d 484, 2007 WL 1953376 (4th Cir. 2007) .. 15

Cited Authorities

Page

Cotto Waxo Co. v. Williams,
46 F.3d 790 (8th Cir. 1995) 15

Dean v. Foods Co. v. Brancel,
187 F.3d 609 (7th Cir. 1999) 15

In re Jet Blue Airways Privacy Litig.,
379 F. Supp. 2d 299 (S.D.N.Y. 2005) 24

NCAA v. Miller,
10 F.3d 633 (9th Cir. 1993), *cert. denied*,
Tarkanian v. NCAA, 511 U.S. 1033 (1994) 15

New Hampshire Motor Transport Ass'n v. Rowe,
448 F.3d 66 (1st Cir. 2006), *cert. granted*,
__ U.S. __, 2007 WL 180122 (2007) 23, 25

United Airlines, Inc. v. Mesa Airlines, Inc.,
219 F.3d 605 (7th Cir. 2000) 23

Wine & Spirits Retailers, Inc. v. Rhode Island,
481 F.3d 1 (1st Cir. 2007) 15

Cited Authorities

Page

State Cases:

Bostain v. Food Express, Inc.,
127 Wn. App. 499, 111 P.3d 906 (2005) 4

Dep't of Labor & Indus. v. Overnite Transp. Co.,
67 Wn. App. 24, 834 P.2d 638 (1992),
review denied, 120 Wn.2d 1030 (1993) 3

Oltman v. Holland America Line USA, Inc.,
136 Wn. App. 110, 148 P.3d 1050 (2006) 13

Innis v. Tandy Corp.,
141 Wn.2d 517, 7 P.3d 807 (2000) 16

Voicelink Data Servs., Inc. v. Datapulse, Inc.,
86 Wn. App. 613, 937 P.2d 1158 (1997) 13

Page

Other Cases:

American Libraries Ass'n v. Pataki,
969 F. Supp. 160 (S. D. N.Y. 1997) 15

District of Columbia v. Schwerman Trucking Co.,
327 A.2d 818 (D.C. 1974) 3

Leonard v. Northwest Airlines, Inc.,
605 N.W.2d 425 (Minn. App. 2000),
review denied, (Minn. 2000), *cert. denied*,
121 S. Ct. 183 (2000) 24

RLH Indus., Inc. v. SBC Commc'ns, Inc.,
133 Cal. App. 4th 1277 (Cal. App. 2005),
review denied, (Cal. 2006), *cert. denied*,
127 S. Ct. 78 (2006) 15

Federal Statutes:

28 U.S.C. § 1257(a) 1

29 U.S.C. § 213(b)(1) 20

49 U.S.C. § 3101 20

49 U.S.C. § 14501(c)(1) 2, 20, 21

49 U.S.C. § 41713(b)(4)(A) 21

Page

State Statutes:

Wash. Rev. Code § 49.46.005 16

Wash. Rev. Code § 49.46.090 3

Wash. Rev. Code § 49.46.130(1) 2, 4

Wash. Rev. Code § 49.46.130(1)(f) 4

Wash. Rev. Code § 49.48.030 3

Wash. Rev. Code § 49.52.070 3

Other State Statutes:

Cal. Labor Code § 510(a) 11

Conn. Gen. Stat. § 31-76i(a) 11

820 Ill. Comp. Stat. § 105/3(d)(7) 11

Ind. Code Ann. § 22-2-2-3(p) 11

Ky. Rev. Stat. Ann. § 337.285 11

Md. Code Ann., Labor & Employ. § 3-415(c)(1) .. 11

Mass. Gen. Law Ann. Ch. 151 § 1A(8) 11

	Page
Minn. Stat. § 177.23(7), (16)	11
Nev. Rev. Stat. § 608.018(b), (f), (g)	11
N.C. Gen. Stat. § 95-25.14(c)(1)	11
43 Pa. Cons. Stat. Ann. § 333.105(b)(7)	11
R.I. Gen. Laws § 28-12-4.3(7)	11
Vt. Stat. Ann. Title 21 § 3384(b)(5)	11
W. Va. Code § 21-5C-1(f)(17)	11
Wis. Stat. § 272.04	11
Rules and Regulations:	
49 C.F.R. § 395	20
Restatement (Second) of Conflict of Laws § 188 (1971)	12
Or. Admin. R. 839-20-0125(3)	11
State Codes:	
Wash. Admin. Code § 296-128-011	4

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Page

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Dann Murray, James Hardman, "Understanding Compensation and Overtime Exemption Issues in the U.S. Trucking Industry," American Transportation Research Institute, January 26, 2007 6

H.R. Conf. Rep. No. 103-677, *reprinted in* 1994 U.S.C.C.A.N. 21, 22

H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S.C.C.A.N. 21

www.atri-online.org/industry 6

OPINION BELOW

The Washington Supreme Court's opinion is reported at 159 Wn.2d 700, 153 P.3d 846. It is reprinted at Appendix A. The opinion of the Court of Appeals of Washington, Division 2 dated May 17, 2005 is reported at 127 Wn. App. 499, 111 P.3d 906 (2005) and is reprinted at Appendix B. The amended final order and judgment of the Superior Court of Washington for Clark County dated and filed February 19, 2004 is reprinted at Appendix C.

JURISDICTION

The Washington Supreme Court rendered its opinion in this case on March 1, 2007. A timely motion for reconsideration was denied on June 20, 2007. (Appendix D). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

Article I, § 8:

> The Congress shall have the Power . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Article VI, clause 2:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

Statutory Provisions

49 U.S.C. § 14501(c)(1) (the Federal Aviation Administrative Authorization Act – FAAAA):

> . . . a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

Wash. Rev. Code § 49.46.130(1):

> Except as otherwise provided in this section, no employer shall employ any of his employees for a work week longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT OF THE CASE

Larie Bostain was an interstate truck driver for Food Express, Inc. ("Food Express"). Bostain worked on average 48 hours per week for the company, but never worked more than 40 hours per week in Washington. Bostain resided in Clark County, Washington. Food Express, Bostain's employer, has a terminal in Vancouver, Washington; the company is based in Arcadia, California, with three additional terminals in California

and one in Utah. Bostain drove for Food Express in various states during his tenure with the company.

Bostain was fired by Food Express for insubordination for refusing to comply with the company's mandates regarding hours worked in a week. Food Express applied the maximum hours standards of the United States Department of Transportation. Food Express fired Bostain after he refused to obey the company's direction not to exceed the maximum hours. Bostain then sued Food Express in Washington's Clark County Superior Court, claiming damages for past due overtime wages, interest, double damages, and attorney fees under Wash. Rev. Code §§ 49.46.090, 49.48.030, and 49.52.070. [1]

Since 1989, the Washington State Department of Labor and Industries ("Department") only counted those hours worked by employees within Washington in calculating overtime due to Washington employees.[2] Despite this long-standing

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[1] Washington's minimum wage statute Wash. Rev. Code § 49.46, ("MWA") covers both minimum and overtime wages. Wash. Rev. Code § 49.48.030 provides for fees in successful wage actions and § 49.52.070 provides for double damages and fees in such actions.

[2] Prior to 1989, the Department took the position that drivers who regularly spent more than 50% of their time in Washington were subject to the MWA. *Dep't of Labor & Indus. v. Overnite Transp. Co.*, 67 Wn. App. 24, 33, 834 P.2d 638 (1992), *review denied*, 120 Wn.2d 1030, 847 P.2d 481 (1993). The Department's interpretation comported with the D.C. Circuit's determination that an employee was based in the District for purposes of its wage laws if he or she worked more than 50% of the work time therein. *Williams v. M.T.A. Transit Co.*, 472 F.2d 1258, 1266 (D.C. Cir. 1972).

Subsequently, in *District of Columbia v. Schwerman Trucking Co.*, 327 A.2d 818, 825 (D. C. 1974), the D. C. Court of Appeals held that (Cont'd)

administrative policy, the Clark County Superior Court granted summary judgment to Bostain, awarding him damages for past overtime including for hours worked outside Washington State, along with interest and attorney fees (but not double damages). Appendix C. The Washington Court of Appeals reversed that summary judgment in *Bostain v. Food Express, Inc.*, 127 Wn. App. 499, 111 P.3d 906 (2005). Appendix B. The Washington Supreme Court granted review and reinstated the trial court's judgment in a 5-4 decision. Appendix A.

Rather than affirming the Department's 18-year bright line rule on the eligible hours for calculating an interstate truck driver's entitlement to overtime under Wash. Rev. Code § 49.46.130(1), the Washington Supreme Court concluded that hours worked by a driver outside Washington could be included in the 40-hour calculation, so long as the driver is a "Washington-based" employee. 153 P.3d at 856. The court minimized the practical and constitutional problems of determining how drivers were subject to Washington's overtime wage law, stating "it is difficult to conceive of circumstances where one who does not qualify as the employer of a Washington-based employee would be subject to the MWA's overtime pay regulations." *Id.* The court stated the test for determining if a employee was "based

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(Cont'd)

D.C.'s overtime wage law applied only to hours worked inside the District. In 1989, the Washington Legislature amended the MWA for interstate drivers, Wash. Rev. Code § 49.46.130(1)(f) providing that motor carriers were exempt from Washington's overtime wage law, which is based on an hourly wage rate, if those motor carriers had a compensation system that paid compensation "reasonably equivalent" to overtime to their employees. The Department adopted Wash. Admin. Code § 296-128-011 and Wash. Admin. Code § 296-128-012 to implement Wash. Rev. Code § 49.46.130(1)(f). § 012 defined overtime as " the amount of compensation paid for hours worked within the state of Washington in excess of forty hours per week."

in Washington," and therefore, subject to Washington's overtime wage law, would be resolved using choice of law principles:

> As to potentially inconsistent state laws respecting overtime, this claim implicates choice of law questions that routinely arise. As the Bostains maintain, if the employee is a Washington-based employee subject to Washington's MWA, the employer is not likely to be subject to the wage and hours statutes of another jurisdiction with respect to that employee.

153 P.3d at 855.

Four dissenting justices believed the majority's interpretation of Washington's overtime wage law violated the Commerce Clause, both in its extraterritorial application and under the *Pike*[3] balancing test. 153 P.3d at 862-63.

The Supreme Court of Washington denied reconsideration of its decision on June 20, 2007. Appendix D.

REASONS FOR GRANTING THE PETITION

A. Summary of Reasons

The decision of the Washington Supreme Court to apply Washington's overtime wage law extraterritorially to hours truck drivers work in other states should be reviewed by this Court because that decision ultimately disrupts the national trucking industry, an industry that carries nearly 70% of America's freight

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[3] *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

and employs 2 million drivers in interstate commerce.[4] By the Washington Supreme Court's majority opinion, Washington's overtime wage law applies extraterritorially to hours worked by drivers in other states, effectively regulating commerce outside the state of Washington, in violation of the Commerce Clause. The Washington Supreme Court decision is in direct conflict with this Court's extraterritoriality decisions. U.S. S. Ct. Rule 10(c).

In reaching this result, the Washington Supreme Court improperly conflated the traditional Commerce Clause analysis of undue burden on interstate commerce with this Court's extraterritoriality analysis, when it applied the balancing test to a statute plainly having an extraterritorial effect. This application of *Pike* to statutes having extraterritorial effect flies in the face of this Court's rule that statutes having such an effect violate the Commerce Clause per se. U.S. S. Ct. Rule 10(b).

Moreover, if the *Pike* balancing test were applied, Washington's overtime wage law imposes an undue burden on interstate commerce when applied to interstate truck drivers. That law disrupts the uniformity of labor laws applicable to the national trucking industry, forcing motor carriers to alter the hours and routes of drivers. Balanced against that burden, Washington's law does not fulfill its ostensible purpose of encouraging Washington employment because motor carriers will assuredly avoid the employment of Washington-based drivers. U.S. S. Ct. Rule 10(c).

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[4] *See www.atri-online.org/industry*; *Dan Murray, James Hardman*, "Understanding Compensation and Overtime Exemption Issues in the U.S. Trucking Industry," American Transportation Research Institute, January 26, 2007, memorandum of amici curiae ATA/WTA in support of respondents' motion for reconsideration at 4-6.

Finally, Washington's expansive interpretation of its overtime wage law will likely compel motor carriers to restrict the hours of interstate truck drivers, alter their routes to avoid exposure to overtime wage claims, and perhaps to move their operations from Washington. Such an interpretation of Washington's overtime wage law necessarily affects prices, routes, and services of motor carriers and therefore is preempted by the FAAAA. This Court should grant review to resolve the scope of FAAAA. U. S. S. Ct. Rule 10(b-c).

B. Washington's Overtime Wage Law Violates the Commerce Clause As It Applies to Hours Worked by Interstate Truck Drivers in Other States

The Commerce Clause, Article I, sec. 8, clause 3 of the United States Constitution, grants jurisdiction over interstate commerce to the Congress of the United States. The Commerce Clause has long been understood to have a "negative" aspect that denies the States the power to discriminate against or unduly burden the interstate flow of articles of commerce. *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1 (1824).[5] As early as 1829, this Court scrutinized a state enactment to determine if it intruded upon the federal power over interstate commerce. *Willson v. Black-Bird Creek Marsh Co.,* 27 U.S. (2 Pet.) 245, 252 (1829)

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[5] Chief Justice Marshall wrote in *Gibbons*:

> It has been contended ... that, as the word "to regulate" implied in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing ... There is great force in this argument, and the court is not satisfied that it has been refuted.

Id. at 209.

(upholding Delaware law authorizing company to build dam on creek in face of contention the dam interfered with interstate navigation because it was not "repugnant to the power to regulate commerce in its dormant state"). The Commerce Clause has long since come to be recognized as an implicit restraint on state authority, even in the absence of Congressional legislation on an issue. *See, e.g., United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, __ U.S. __, 127 S. Ct. 1786, 1792-93 (2007); *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995) (dormant Commerce Clause may prohibit state taxation even where Congress has failed to legislate on the issue).

While this dormant Commerce Clause analysis is still sometimes controversial, *see, e.g., American Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 439 (2005) (concurring opinion of Thomas, J.), this Court has steadfastly adhered to the analysis because of the Court's long standing recognition that the analysis vindicates the constitutional goal of an area of trade free from state interference. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977) (stating that "[i]t is now established beyond dispute" that the Commerce Clause "by its own force creates an area of trade free from interference by the states" (citing and quoting *Freeman v. Hewit*, 329 U.S. 249, 252 (1946)).[6]

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[6] That the Framers intended that the Commerce Clause ensure free trade among the states was "so obvious and so fully recognized" they spent little time at the 1787 Convention explaining their specific intent. *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534 (1949). However, this Court has fully recognized that the Framers knew the problems under the Articles of Confederation and "the tendencies toward economic Balkanization that had plagued the Colonies," justifying a limitation of state power under the Commerce Clause. *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979).

It is clear, for example, that a statute regulating activities in another state violates the dormant Commerce Clause per se. The Washington Supreme Court ignores the extraterritorial impact of its overtime law created by its decision and then compounds the problem by importing the *Pike* undue burden analysis of the Commerce Clause into its treatment of extraterritoriality. The Washington court's analysis of its overtime wage law also fails of the *Pike* balancing test.

(a) *Extraterritorial Application*

Under our Constitution, a state is without authority to enact laws intruding upon the internal affairs of another state even in the guise of preserving the health and welfare of its own citizens. *Bigelow v. Virginia,* 421 U.S. 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State."); *BMW of North America, Inc. v. Gore,* 517 U.S. 599, 570-01 (1996) (Congress could enact a national policy on disclosure of presale car repairs, but a single state could not do so, imposing its policy on the others). In our federal system, each state is independent of all others in its ability to legislate with reference to its own jurisdiction. *Bonaparte v. Tax Court,* 104 U.S. 592, 594 (1881).

This Court has expressed a particular distaste for state statutes or regulations that have an extraterritorial sweep, finding them to violate the Commerce Clause per se. *Edgar v. MITE Corp.,* 457 U.S. 624, 642 (1982) (If a state enactment applies on an extraterritorial basis, it offends the Commerce Clause per se, without the necessity of the *Pike* balancing test); *Brown–Forman Distillers Corp. v. New York State Liquor Auth.,* 476 U.S. 573, 579 (1986) (a statute which directly regulates interstate

commerce will "generally [be] struck down . . . without further inquiry.") Thus, in *Healy v. The Beer Institute*, 491 U.S. 324 (1989), this Court invalidated a Connecticut statute that required out-of-state breweries to affirm that their beer prices were no higher than those in neighboring states; the statute had the effect of regulating the prices at which out-of-state shippers could sell beer in other states. This Court stated "a state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause." 491 U.S. at 332. The Court also noted "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Id.* at 336.

Moreover, as an aspect of the extraterritoriality analysis, this Court has also instructed that if a state statute adversely affects interstate commerce by subjecting activities to inconsistent regulations, the statute cannot stand as against the Commerce Clause. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87-88 (1987) (addressing Indiana statute that conditioned the power to vote a controlling block of corporate shares on the approval of a majority of "disinterested" shareholders).

The Washington Supreme Court majority acknowledged this Court's long-standing extraterritorial analysis, but then baldly asserted "if the employee is a Washington-based employee subject to Washington's MWA, the employee is not likely to be subject to the wage and hour statutes of another jurisdiction with respect to that employee." 153 P.3d at 856. The Washington court plainly misunderstood how the American trucking industry operates, and certainly how Food Express operated.

Food Express has a terminal located in Vancouver, Washington. If Food Express directs a driver like Bostain to deliver loads to Food Express' Lathrop, California terminal, the driver would have to travel through Washington, Oregon, and California. Each of these states has a presumptive claim that its law should apply to the portion of the trip occurring within its borders. Oregon would not make such a claim as interstate truck drivers are not paid overtime wages under Oregon law. Or. Admin. R. 839-20-0125(3).[7] California, on the other hand, requires overtime wages to be paid to any employee working more than eight hours in a day. Cal. Labor Code § 510(a). Upon arrival in Lathrop, California, the driver could easily be directed by the terminal manager to hold over and work out of the Lathrop terminal, or another terminal, for a period of time sufficient to trigger California's law. In short, the actual reality of the American trucking industry generally, and of Food Express' business in particular, suggests that – contrary to the assumptions of the Washington Supreme Court – a trucking industry employer is *quite* likely to be subject to the wage and hour statutes of other jurisdictions with respect to the work of its (so-called) "Washington-based" driver employees, contrary to this Court's determination in *CTS Corp.* that activities in interstate commerce must not be subjected to inconsistent regulation.

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[7] Many of the 50 states exempt truck drivers from their overtime wage laws. *See, e.g.*, Conn. Gen. Stat. § 31-76i; 820 Ill. Comp. Stat. § 105/3(d)(7); Ind. Code Ann. § 22-2-2-3(p); Ky. Rev. Stat. Ann. § 337.285(2)(c); Md. Code Ann., Labor & Employ. § 3-415(c)(1); Mass. Gen. Law Ann. Ch. 151 § 1A(8); Minn. Stat. Ann. § 177.23(7),(16); Mont. Stat. Ann. § 39-3-406(2)(a); Nev. Rev. Stat. § 608.018.3(f); N.C. Gen. Stat. Ann. § 95-25.14(c)(1); 43 Pa. Cons. Stat. Ann. § 333.105(b)(7); R.I. Gen. Laws § 28-12-4.3(a)(7); 21 Vt. Stat. Ann. § 384(b)(5); W. Va. Code § 21-5C-1(f)(17); Wis. Admin. Code, Dept. of Workforce Devel., § 272.04(4). These states recognize the safety purpose of federal law and its Fair Labor Standards Act ("FLSA") exemption for trucking. *See* n.11 *infra*. Such exemptions are consistent with a smoothly operating national trucking system.

This Court's precedents make plain that Washington may not "project its [wage and hour] legislation into other States by regulating the price to be paid for [labor] . . . in those States." *Brown-Forman Distillers*, 476 U.S. at 583 (citing and quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) (brackets omitted)). Rather, it is for these other states to decide whether and how to regulate the price of that labor, including whether and to what extent to require overtime pay. The Washington Supreme Court nonetheless presumes to suggest that a "project[ion]" of Washington's overtime requirements is valid, so long as the projection is grounded in a choice of law analysis. The Washington court offers no authority for what is, in fact, a proposition wholly without support in Commerce Clause extraterritoriality jurisprudence – that a state may project its wage and hour legislation into other states, and regulate the price paid for labor in another state, so long as the result can be squared by the projecting state with *its own* choice of law rules. The problem, of course, is that Washington will still be "directly control[ling] commerce occurring wholly outside" the state's boundaries and this will exceed "the inherent limits of the enacting State's authority" and be invalid because of its extraterritorial reach. *Healy*, 491 U.S. at 336.

The Washington court's approach to the determination of whether a driver is "Washington-based" necessarily requires Food Express and every other motor carrier doing business in Washington to undertake a choice of law analysis to determine if a driver must be paid overtime under Washington law for hours worked outside of Washington.[8]

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[8] Washington applies the most significant contacts analysis of the *Restatement (Second) of Conflict of Laws* § 188 (1971), for contracts of employment. Resolution of this issue could be further complicated by

(Cont'd)

Because a driver's hours of operation and route of travel can vary dramatically from week to week, no motor carrier could hope to predict beyond the week at hand what law should apply to that driver's work. And even for the week at hand, the Washington Supreme Court's approach requires motor carriers to conduct a full-blown choice of law analysis to determine if that driver was entitled to overtime under Washington law. The correct application of choice of law principles is often a mysterious exercise for lawyers; it will prove an unending nightmare for motor carrier staffers not schooled in legal intricacies, as they struggle to determine, week in and week out, whether a driver was "based in Washington" and therefore owed overtime under Washington's overtime wage law for every hour over 40 hours worked that week – no matter in what state the work actually took place. Also, given the inherently imprecise and uncertain nature of choice of law analysis, it is likely that more than one state will from time to time claim an interest in regulating the hours worked by truck drivers within their jurisdiction, thereby subjecting a motor carrier to different and inconsistent regulations – a result squarely forbidden by *CTS Corp.* and related precedents.

This Court should grant review to reaffirm its bright line rule that extraterritorial application of statutes offends the Commerce Clause.

(Cont'd)
contractual choice of law provisions that are routinely enforced in Washington. *See, e.g., Oltman v. Holland America Line USA, Inc.*, 136 Wn. App. 110, 148 P.3d 1050 (2006); *Voicelink Data Servs., Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 937 P.2d 1158 (1997).

(b) *The Washington Court Conflated This Court's Undue Burden and Extraterritoriality Analyses*

A state statute violates the Commerce Cause if it discriminates against interstate commerce on its face, *e.g., American Trucking Ass'ns, Inc. v. Michigan Public Service Commission*, 545 U.S. 429, 433 (2005), or (even if not facially) it places an undue burden on interstate commerce. *E.g., Pike v. Bruce Church, supra.* Whether a state statute places an undue burden on interstate commerce is determined by application of this Court's "balancing test," which weighs a state regulation's burden on interstate commerce against the local interest being served by the regulation; the test also examines whether that local interest could be served as well by less burdensome alternatives. *See Pike,* 397 U.S. at 142 (explaining that a Commerce Clause balancing test violation occurs when "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits" of a challenged regulation and noting that the extent of the burden tolerated depends on whether the purpose of the regulation "could be promoted as well with a lesser impact on interstate activities.").

The Washington Supreme Court holds that the MWA may be applied to out-of-state hours because Food Express has shown no "'sweeping extraterritorial effect' *that would outweigh the local benefits' of the MWA.*" 153 P.3d at 856 (quoting *State v. Heckel,* 143 Wn.2d 824, 24 P.3d 404, 412 (2001), in turn quoting *Edgar v. MITE Corp.,* 457 U.S. 624, 642 (1982)) (emphasis added). This holding squarely conflicts with *Healy, Brown-Forman Distillers,* and *Baldwin*, which erect a per se bar against statutes having such an impermissible extraterritorial effect, regardless of the alleged "local benefits," and do not require a *Pike* balancing.

Following this Court's lead, the federal circuit courts of appeal have uniformly held that laws having an extraterritorial effect violate the dormant Commerce Clause per se. *See, e.g., Dean Foods Co. v. Brancel,* 187 F.3d 609, 616 (7th Cir. 1999) (The Supreme Court has not "backed away from the long-established core principle that a statute or regulation that violates the extraterritoriality ban is per se invalid."); *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.,* 492 F.3d 484, 492 (4th Cir. 2007) (recognizing that laws "with forbidden extraterritorial reach" are "virtually *per se* invalid under the Commerce Clause'") (quoting *Brown-Forman*); *NCAA v. Miller,* 10 F.3d 633, 640 (9th Cir. 1993) (state laws having an impermissible extraterritorial effect are per se invalid); *Am. Booksellers Found. v. Dean,* 342 F.3d 96, 104 (2d Cir. 2003) (same); *ACLU v. Johnson,* 194 F.3d 1149, 1161 (10th Cir. 1999) (same); *Cotto Waxo Co. v. Williams,* 46 F.3d 790, 793 (8th Cir. 1995) (same); *Wine & Spirits Retailers, Inc. v. Rhode Island,* 481 F.3d 1, 15 (1st Cir. 2007) (same).

The Washington Supreme Court and the California Court of Appeals have now held that the *Pike* balancing test applies to such laws. *See RLH Indus., Inc. v. SBC Commc'ns, Inc.,* 133 Cal. App. 4th 1277, 1288-93, 35 Cal. Rptr.3d 469, *review denied,* (Cal. 2006), *cert. denied,* 127 S. Ct. 78 (2006). The Washington court explicitly asserted that extraterritoriality analysis is a facet of the *Pike* test. 153 P.3d at 855.[9] The district court in *American Libraries Ass'n v. Pataki,* 969 F. Supp. 160 (S. D. N.Y. 1997), felt obliged to analyze New York's internet obscenity law for minors both under an extraterritorial *per se* analysis and a *Pike* balancing test. Extraterritoriality is a distinct

[9] The Washington Supreme Court in *Heckel* also stated the extraterritorial analysis was appropriately regarded as a facet of the *Pike* balancing test. 24 P.3d at 411.

analysis of the Commerce Clause, separate from the *Pike* balancing test.

This Court should grant review to reaffirm its long-standing policy that the extraterritorial application of state laws violates the Commerce Clause *per se*.

(c) *Washington's Overtime Wage Law Fails the Pike Balancing Test*

Applying the *Pike* balancing test, this Court has invalidated statutes that unduly burden interstate commerce even when the state has claimed a strong safety rationale for its law. *See Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (state mandate to use special mud flaps on trucks); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978) (state statute banning 65-foot double trailers); *Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662 (1981) (state law banning trailer combinations longer than 55 feet). The purpose of Washington's overtime wage law is not even safety-based, but rather "to encourage employment opportunities within the state." RCW 49.46.005; *see also, Innis v. Tandy Corp.*, 141 Wn.2d 517, 538, 7 P.3d 807 (2000) ("The purpose of overtime wage laws is to encourage employers to spread employment by hiring additional workers rather than paying overtime."). Although Washington claims its overtime law has a police power purpose, a speculative police benefit purpose is not enough to overcome the burden Washington's overtime wage law imposes on interstate commerce.

Contrary to the naïve understanding of the Washington Supreme Court regarding the trucking industry and the burden that would be placed on interstate commerce by radically different approaches to overtime wages for drivers operating in various states, 153 P.3d at 856, computing eligibility for overtime

based on total hours worked per week rather than just the hours worked in the State of Washington places a significant burden on interstate commerce and does not advance the goal of Washington's overtime law to increase employment opportunities in the state.

In undertaking the balancing of local benefits against the burden on interstate commerce, the Washington court identified the principal local benefit as being the establishment of minimum employment standards and encouragement of employment opportunities within the state. 153 P.3d at 855.

Against this local benefit are a number of undue burdens placed on interstate commerce by the Washington court's determination that Washington's overtime law applies to a driver's extraterritorial hours.

First, Washington's approach defeats the national uniformity for the trucking industry, a goal that constitutes the core policy of the Commerce Clause. Under the Washington court's analysis, the trucking industry would be exposed to varying, possibly inconsistent, state regulations governing driver eligibility for overtime. *See Healy*, 491 U.S. at 336 (a state regulation should be examined as to the "effect [that] would arise if not one, but many or every, State adopted similar legislation."). Many states with different overtime policies could lay claim to jurisdiction over an interstate truck driver passing through the state on a trip chain.

If overtime eligibility is not tied to work performed in a particular state, an array of jurisdictional questions arise: For example, which state's law controls? Is it where the company is located, where the driver resides, where the majority of the work took place, where the work in excess of 40 hours took place?

The states approach the payment of overtime in different ways, illustrating how this nexus analysis has a critical impact on interstate activities. A driver would seek coverage under the most favorable state law through which he or she traveled. Carriers would alter routes and hours accordingly. A motor carrier would assert the "nexus" is more appropriately with a state that eschews overtime for interstate drivers, and schedule drivers' routes accordingly. The uniformity envisioned by the Commerce Clause would be defeated.

Second, Washington's interpretation of its overtime law would be disruptive to the day-to-day operation of the national trucking industry. If Washington's overtime requirement is based on total weekly working hours, not just those worked in Washington, it imposes enormous burdens on motor carriers.

Interstate truck driving is a unique profession requiring extended stretches of time on the road, followed by longer than usual off duty periods. Most interstate motor carriers operate nationally or over large multi-state regions, and the highly competitive, low profit margin nature of their businesses requires a business model that efficiently utilizes equipment and drivers. Most carriers employ "trip chains" that route their trucks on a series of movements around the country. Neither the carrier nor the driver knows the legs of that journey at the beginning of the chain. For example, a truck and driver may be dispatched from a terminal in Washington to deliver a load in Los Angeles. When that delivery is completed, dispatchers then find the closest next available load, which could be destined for anywhere in the country. The driver then embarks on the next link in the trip chain wherever dispatched, whether to Chicago, New York, Miami, or even back to Washington. Then, upon delivery of that next load, the driver is again routed, based upon what load becomes available nearest to that point of delivery. This type of

cycle may go on for two weeks or more, before the driver is routed back to his or her home base. *See,* Wash. Supreme Court amicus brief of ATA/WTA at 9-10.

The highly unstructured nature of truck driving (with unknown and widely varying waiting times for load assignments, highly variable loading and unloading times, and unforeseeable traffic and weather conditions) does not neatly fit into an 8-hour day or a 40-hour workweek. Rather, drivers must be free, within the timelines set by the federal hours-of-service regulations, to work the irregular hours needed to get the job done. If carriers were not free to utilize their drivers within the federal limitations and instead were responsible for overtime on their multi-state operations, it would throw those operations into financial turmoil and would compromise safety by forcing carriers, because of financial considerations, to adopt artificial hourly limits inconsistent with operational needs.

Balanced against the burdens it places on interstate commerce, the Washington court's interpretation of its overtime law offers little benefit. As explained by amici to the Washington Supreme Court, the Court's decision will not increase Washington-based employment in the trucking industry but will instead force interstate motor carriers to move their terminals and operations to other states. Alternatively, it could result in motor carriers eliminating employed drivers and using owner-operators, independent contractors who are commonly used in the trucking industry. Washington law, for example, provides that such owner operators of trucks are not employees of motor carriers for worker compensation purposes. Wash. Rev. Code § 51.08.180. *See Wash. St. Dep't of Labor & Indus. v. Mitchell Bros. Truck Line, Inc.*, 113 Wn. App. 700, 54 P.3d 711 (2002). The ostensible purpose of Washington's overtime wage law of expanding Washington employment would not be advanced by applying the statute to hours worked outside of Washington.

C. The FAAAA Preempts Wash. Rev. Code § 49.46.130 If It Applies to Hours Worked in Other States

The Washington Supreme Court cavalierly addresses the issue of FAAAA preemption in a footnote, asserting that despite this Court's broad interpretation of an analogous preemption clause in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), this "Court has since pulled back from its previous interpretation." 153 P.3d at 856 n.9.[10] The Washington court's conclusion that the FAAAA does not preempt application of Washington's overtime wage laws outside the state is in conflict with this Court's decisions and those of the federal circuit courts.

Under the Washington court's interpretation of its overtime law, the statute is preempted. The FAAAA broadly preempts any state "law related to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1); *see id.* § 41713(b)(1).[11] This provision has been interpreted consistently to preempt any state

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[10] The Washington court discussed the issue whether the MWA is preempted by the Motor Carriers Act, 49 U.S.C. § 3101, *et seq.*, 153 P.3d at 854, but that jurisprudence on federal preemption of Washington's overtime wage law is unrelated to, and actually predates, the FAAAA.

[11] The federal government already regulates the work of interstate truck drivers. During the trip chains of interstate trucking drivers, a driver's hours are regulated by the Department of Transportation under the federal hours-of-service rules (49 C.F.R. § 395). The hours-of-service regulations have been carefully crafted by that federal agency to best promote safety consistent with the operational necessities of interstate truck transportation. In fact, because of the safety-related nature of the federal hours-of-service regulations, the FLSA expressly excludes such interstate truck drivers from eligibility for overtime. *See* 29 U.S.C. § 213(b)(1). *See also, Levinson v. Spector Motor Serv.*, 330 U.S. 649, 677 (1946) (recognizing that Congress in enacting the FLSA exemption put "safety first").

law that expressly references or significantly affects a price, route, or service of any motor carrier. Washington's overtime law, if based on out-of-state hours worked, would affect the price, route, and service of a motor carrier and is therefore preempted by the FAAAA.

Beginning with the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, Congress made a commitment to deregulate the motor carrier industry. At that time, Congress found that "[t]he existing [federal] regulatory structure ha[d] tended in certain circumstances to inhibit innovation and growth and has failed, in some cases, to sufficiently encourage operating efficiencies and competition." H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S.C.C.A.N. at 2283, 2292. It soon became clear, however, that federal deregulation could not serve its purposes if any state regulation persisted at all. In 1994, "[t]o ensure that the States would not undo federal deregulation with regulation of their own" (*Morales,* 504 U.S. at 378), Congress enacted the broad preemption provision of the FAAAA. Under the FAAAA, any "law related to a price, route, or service of any motor carrier" is preempted. 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A).[12] FAAAA preemption completes a federal transportation policy that promotes uniformity by preempting state regulation.

The scope of the FAAAA's preemption is broad. In *Morales*, this Court found that a virtually identical preemption provision in the Airline Deregulation Act preempted a state law if it either: (1) makes "express reference" to carriers' price, route, or service, or (2) has a "forbidden significant effect" on price, route, or

[12] The central purpose of the FAAAA preemption was to free trucking from the "patchwork" of state regulatory requirements that had developed prior to the FAAAA's enactment. H.R. Conf. Rep. No. 103-677, at 87, *reprinted in* 1994 U.S.C.C.A.N. at 1759.

service. *Morales*, 504 U.S. at 388. In enacting the FAAAA, Congress expressly adopted "the broad preemption interpretation adopted by the United States Supreme Court" in *Morales*. H.R. Conf. Rep. No. 103-677, at 83, 1994 U.S.C.C.A.N. at 1755.

The "retreat" suggested by the Washington Supreme Court has occurred in the context of ERISA cases, *not* the Airline Deregulation Act or FAAAA cases, and does not square with what Congress intended in basing its FAAAA preemptive language on *Morales*. Moreover, while the Washington court perceived the "retreat" from *Morales* in this Court's decisions in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), and *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316 (1997), cases pertaining to whether a state law "relates to" ERISA for purposes of preemption, the Washington court blithely ignores *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), a decision in which this Court overruled a Washington Supreme Court decision and held a state law was "related to" ERISA and was preempted. ERISA continues to preempt state laws that relate to its provisions.

In *Travelers* and *Dillingham*, this Court held that a mere connection to ERISA was insufficient to permit federal preemption in traditional fields of state regulation.[13] The Court eschewed "uncritical literalism" in applying the ERISA pre-emption, *Dillingham*, 519 U.S. at 325, and has held that where the state law has only a "tenuous, remote, or peripheral

[13] Even where a statute addresses a traditional state police power concern, preemption is nonetheless possible. *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (ERISA preempted New York's human rights law that prohibited employers from structuring employee benefit plans so as to discriminate on the basis of pregnancy.)

connection with covered plans," pre-emption does not follow. *Travelers,* 514 U.S. at 661 (*quoting District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. at 130, n.1).

In *Egelhoff,* far from "retreating" from ERISA preemption, this Court held that a Washington statute providing for automatic revocation of any spouse's designation of another spouse as a beneficiary of a nonprobate asset upon their divorce was preempted. This Court held that insofar as the statute governed payment of benefits in ERISA plans, a central ERISA concern, it was preempted because it disrupted the uniform administrative scheme envisioned by Congress for ERISA plans.

If there is to be a "retreat" from *Morales,* it is not the prerogative of the Washington Supreme Court to anticipate it. As the First and Seventh Circuits have held: "[I]f developments in pension law have undercut holdings in air-transportation law, it is for the Supreme Court itself to make the adjustment. [Lower court'] marching orders are clear: follow [Supreme Court] decisions until the Supreme Court overrules them." *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 608 (7th Cir. 2000); *N.H. Motor Transp. Ass'n v. Rowe,* 448 F.3d 66, 76 (1st Cir. 2006) (same). Congress intended the Airline Deregulation Act and FAAAA preemption provisions to mirror *Morales;* there is no reason that a subsequent putative narrowing of ERISA preemption should affect FAAAA preemption. *See Rodriguez de Quijas v. Shearson/Am. Express*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling it own decisions.").

The Washington Supreme Court's approach to FAAAA preemption is similar to that of the Second and Ninth Circuits. *See Californians for Safe & Competitive Dump Truck Transp. v. Mendonca,* 152 F.3d 1184, 1188-89 (9th Cir. 1998); *Abdu-Brisson v. Delta Airlines, Inc.,* 128 F.3d 77, 82-83 (2d Cir. 1997); *see also, In re Jet Blue Airways Privacy Litig.,* 379 F. Supp. 2d 299, 314-15 n.11 (S. D. N.Y. 2005) (following the Second Circuit's approach to noting that "[o]ther courts have been understandably reluctant to narrow the Supreme Court's preemption analysis in *Morales* based upon subsequent interpretations of the ERISA provision"); *Leonard v. NW Airlines, Inc.,* 605 N.W.2d 425, 430 (Minn. App. 2000) (noting that "[s]ome federal courts have adopted the Court's narrowed ERISA preemption analysis in resolving controversies arising under the ADA's preemption clause," but finding it unnecessary to choose between following "the *Morales* textual standard" or the "narrowed" approach), *review denied,* (Minn. 2000), *cert. denied,* 121 S. Ct. 183 (2000).

Although *Dillingham* and *Mendonca* both involved California's prevailing wage laws, the mere fact that Washington's overtime wage law is at issue here does not prevent the FAAAA's preemptive language from applying. California's prevailing wage statute dates from 1937 and has been interpreted consistently since that time. The *Mendonca* court could not find an *acute* impact of paying prevailing wages on routes, prices, or services. Here, by contrast, the Washington court's interpretation of the Washington MWA is new and has an *acute* impact on the activities of motor carriers as described *supra.* The Washington court's interpretation of its overtime wage *directly* affects the price of goods delivered by motor carriers, the routes over which drivers will travel, and the services rendered by such carriers.

This Court should grant review to re-affirm the application of *Morales* to FAAAA preemption for the trucking industry.[14]

CONCLUSION

The decision of the Washington Supreme Court strikes to the heart of the national trucking industry, disrupting how that industry handles interstate truck drivers. That court's decision is contrary to this Court's Commerce Clause jurisprudence and Congressional preemptive intent in the FAAAA.

The analysis of that state's overtime law by the Washington Supreme Court unconstitutionally applies extraterritorially, offending the Commerce Clause. That court's decision reaches far beyond the Washington state borders, affecting every single motor carrier in America. Its interpretation of the Washington overtime law renders it subject to the FAAAA's preemptive effect because it defeats the intent of Congress to preempt virtually all state statutes dealing with trucking. This Court should accept review.

Respectfully submitted,

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[14] This Court has granted a writ of certiorari in *Rowe v. New Hampshire Motor Transport Ass'n* (Cause No. 06-457). At a minimum, any decision on the writ in this case should await this Court's disposition of the preemption question in *Rowe*.

APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF WASHINGTON FILED MARCH 1, 2007

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 77201-1

En Banc

LARIE E. BOSTAIN and LAURIE JO BOSTAIN, husband and wife,

Petitioners,

v.

FOOD EXPRESS, INC., an unregistered corporation; and MARK WIDING, a single man;

Respondents.

MADSEN, J. — Petitioners Larie E. and Laurie Jo Bostain seek reversal of a Court of Appeals' decision holding that Mr. Bostain is not entitled to overtime pay for work as an interstate truck driver because although he worked in excess of 40 hours per week, he did not work more than 40 hours a week within the state of Washington. The Bostains maintain that Mr. Bostain's employer, respondent Food Express, Inc., is liable to Mr. Bostain under Washington's Minimum Wage Act (MWA), chapter 49.46 RCW, for overtime based on all hours worked, whether within Washington State or outside the state. We agree. By

definition, an interstate trucker will spend some hours driving outside Washington State. RCW 49.46.130(1) requires overtime compensation for interstate truck drivers. The statute makes no distinction between the hours spent driving in state and those spent driving outside Washington. Accordingly, we reverse the Court of Appeals.

FACTS

Food Express employed Mr. Bostain as a truck driver for almost 10 years before his employment was terminated on May 28, 2002. Food Express, a California corporation headquartered in Arcadia, California, is a motor carrier subject to the Federal Motor Carrier Act (FMCA), 49 U.S.C. §§ 31501-31504. It hauls food products between points in several western states. Food Express's Washington operations include a terminal in Vancouver, Washington, out of which approximately 25 trucks operate. Food Express also owns property in Fruit Valley, Washington, a short distance from the Vancouver terminal where it has its truck wash plant, shop, yard, and maintenance facilities. Food Express has a few trucks parked in the Seattle area and other trucks in other Washington locations. The Washington operations principally involve picking up container loads of bulk products shipped into Washington by rail and delivering them to places in Washington, Oregon, and Idaho.

Mr. Bostain was hired by Food Express on August 6, 1992, as an interstate truck driver based at the Vancouver terminal. Bostain lived in Clark County, Washington, and worked out of the Vancouver terminal the entire time he worked for Food Express. Dispatchers at the terminal gave

him his orders, and he began and ended his runs there. He also turned in his time and picked up his paychecks, which were issued from the Arcadia office, at the Vancouver terminal. He drove with a Washington driver's license.

Food Express paid Bostain an hourly wage, but if he drove over 200 miles it paid him by the mile. Food Express told Bostain when he was hired that because he would be driving interstate he would not receive overtime. Bostain was never paid overtime and did not complain about this until after Food Express fired him for violating federal driving time limitations.[1] A log audit of Bostain's final year of work for Food Express showed that Bostain averaged 48 working hours per week but that he never worked more than 40 hours in a week within Washington.[2] He spent 37 percent of his driving time in Washington and 63 percent out of state.

On December 3, 2002, the Bostains brought this suit for unpaid overtime, unpaid wages, and willful failure to pay wages. They also sought attorney fees pursuant to RCW 49.46.090(1), RCW 49.48.030, and RCW 49.52.070. The trial court granted summary judgment to the Bostains, ruling that truck drivers are entitled to overtime pay under the MWA if they are employed in Washington but spend some of their

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1. Bostain was told by a dispatcher to spend the night in Eugene, Oregon, rather than continue to Vancouver because he was over his federally permissible driving time. Bostain nevertheless drove to his home outside Vancouver.

2. Food Express says in its briefing that if it owes any overtime, it is only for 2.5 hours. The parties' arguments ignore this 2.5 hours; therefore, we will not address it.

driving time outside the state. The trial court also granted attorney fees under RCW 49.46.090(1) and RCW 49.48.030. The court entered judgment against Food Express of $9,846.64 for unpaid overtime wages, $3,236.21 in prejudgment interest, and $15,000 for attorney fees, determined below the lodestar and without a multiplier.

Food Express appealed. The Bostains cross-appealed, contending that they should be awarded double damages under RCW 49.52.070 and that the trial court should have awarded a larger amount for attorney fees. The Court of Appeals reversed, holding that Mr. Bostain was not entitled to overtime for hours worked outside Washington State. *Bostain v. Food Express, Inc.*, 127 Wash.App. 499, 111 P.3d 906 (2005), *review granted*, 156 Wash.2d 1010, 132 P.3d 145 (2006). In light of this holding, the Court of Appeals did not reach the issue of attorney fees. We granted the Bostains' petition for discretionary review. Amicus curiae briefs have been filed by the Washington Trucking Associations/ American Trucking Associations, Inc. and the Washington Employment Lawyers Association.[3]

ANALYSIS

Review of a grant of summary judgment is de novo. *Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wash.2d 168, 177, ¶ 12, 125 P.3d 119 (2005); *Berrocal v. Fernandez*, 155 Wash.2d 585, 590, ¶ 5, 121 P.3d 82 (2005). Summary judgment is proper if there is no genuine issue as to any

3. The Department of Labor and Industries submitted an amicus curiae brief in the Court of Appeals.

material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Korslund,* 156 Wash.2d at 177, ¶ 12, 125 P.3d 119; *Berrocal,* 155 Wash.2d at 590, ¶ 5, 121 P.3d 82. Facts and reasonable inferences therefrom are viewed most favorably to the nonmoving party. *Korslund,* 156 Wash.2d at 177, ¶ 12, 125 P.3d 119; *Berrocal,* 155 Wash.2d at 590, ¶ 5, 121 P.3d 82. Summary judgment is proper if reasonable minds could reach only one conclusion from the evidence presented. *Korslund,* 156 Wash.2d at 177, ¶ 12, 125 P.3d 119; *Berrocal,* 155 Wash.2d at 590, ¶ 5, 121 P.3d 82.

The Bostains contend that the Court of Appeals erroneously concluded that the MWA's overtime provision applies only to work performed within Washington State.

Questions of statutory interpretation are questions of law that are reviewed de novo. *Id.; Fluor Hanford, Inc. v. Hoffman,* 154 Wash.2d 730, 737, ¶ 5, 116 P.3d 999 (2005). Our goal is to effectuate the legislature's intent. *State v. Jacobs,* 154 Wash.2d 596, 600, ¶ 7, 115 P.3d 281 (2005). If the statute's meaning is plain, we give effect to that plain meaning as the expression of the legislature's intent. *Id.* Plain meaning is determined from the ordinary meaning of the language used in the context of the entire statute in which the particular provision is found, related statutory provisions, and the statutory scheme as a whole. *Id.* If, however, the statutory language is susceptible to more than one reasonable interpretation, it is ambiguous and we resolve the ambiguity by resort to other indicia of legislative intent, including legislative history, and, if necessary, we then apply principles of statutory construction to resolve any remaining ambiguity. *See id.*

Appendix A

Subject to specific exemptions, the MWA requires employers to pay their employees (as the act defines "employees") overtime pay for the hours they work over 40 hours per week. RCW 49.46.130; *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wash.2d 291, 299, 301, 996 P.2d 582 (2000). RCW 49.46.130(1) states that "[e]xcept as otherwise provided in this section, no employer shall employ any of his employees for a work week longer than forty hours unless such employee receives compensation" for hours worked over 40 hours "at a rate not less than one and one-half times the regular rate at which he is employed." One exemption from this rule applies to interstate bus or truck drivers who are subject to the FMCA, provided that "the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to that required by this subsection, for working longer than forty hours per week." RCW 49.46.130(2)(f).[4]

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4. RCW 49.46.130 provides in part:

> (1) Except as otherwise provided in this section, no employer shall employ any of his employees for a work week longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.
>
> (2) This section does not apply to:
>
> . . . .
>
> (f) An individual employed as a truck or bus driver who is subject to the provisions of the Federal Motor Carrier Act (49 U.S.C. Sec. 3101

(Cont'd)

Appendix A

The Bostains maintain that RCW 49.46.130(1) unambiguously requires that overtime must be paid unless a specific exemption applies. They contend that the exemption in subsection (2)(f) does not apply because Mr. Bostain did not receive compensation "reasonably equivalent" to the overtime required under RCW 49.46.130(1), and therefore the administrative rules that the Court of Appeals utilized as aids to interpreting the statute do not apply because these rules pertain only to drivers who are paid "reasonably equivalent" compensation. Food Express contends, however, that the Court of Appeals properly considered language in RCW 49.46.005 and two administrative rules promulgated by the Department of Labor and Industries, WAC 296-128-011 and WAC 296-128-012, in arriving at the conclusion that only hours worked in Washington are considered for purposes of determining whether overtime must be paid.

On its face, RCW 49.46.130(1) does not limit the requirement for overtime pay to hours worked in Washington, nor does it do so specifically for truck drivers subject to the FMCA. The statute contemplates that in general truck drivers will receive overtime pay, evidenced by the fact that the exemption in (2)(f) applies only if the driver obtains overtime or its reasonable equivalent. That is, whether paid under the time-and-a-half provisions of RCW 49.46.130(1) or by "reasonably equivalent" compensation, the statute mandates

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(Cont'd)

> et seq. and 49 U.S.C. Sec. 10101 et seq.), if the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to that required by this subsection, for working longer than forty hours per week.

that truck drivers must obtain extra compensation for hours worked over 40 hours per week. Moreover, by writing the exemption in RCW 46.49.130(2)(f) as it did, the legislature recognized that truck drivers are subject to the overtime provisions of RCW 49.46.130(1) even though they spend part of their time engaged in interstate transportation. This is because if a worker is subject to the FMCA, by definition he or she performs some of his or her work in interstate trucking and thus out of state. *See* 49 U.S.C. § 31502(a)(1) (formerly 49 U.S.C. § 3102) (act applies to motor carriers transporting people or property between one state and another, or within the same state if the route transverses another state).

The plain language of RCW 49.46.130(1) requires overtime compensation for hours worked over 40 per week for interstate driving, with no suggestion in the statute that there is a requirement that only hours worked within this state may be considered.

We must, of course, read the statute in conjunction with other relevant provisions in chapter 49.45 RCW. *See, e.g., Jacobs,* 154 Wash.2d at 600, ¶ 7, 115 P.3d 281. Food Express maintains, and the Court of Appeals held, that RCW 49.46.005 must be read together with RCW 49.46.130, and RCW 49.46.005 provides that the overtime provisions of RCW 49.46.130 apply only to hours worked within Washington State.

Appendix A

RCW 49.46.005 states:

> Whereas the establishment of a minimum wage for employees is a subject of vital and imminent concern to the people of this state and requires appropriate action by the legislature *to establish minimum standards of employment within the state of Washington*, therefore the legislature declares that in its considered judgment the health, safety and the general welfare of the citizens of this state require the enactment of this measure, and exercising its police power, the legislature endeavors by this chapter to establish a minimum wage for *employees of this state to encourage employment opportunities within the state.* The provisions of this chapter are enacted in the exercise of the police power of the state for the purpose of protecting the immediate and future health, safety and welfare of the people of this state.

(Emphasis added.)

Contrary to the Court of Appeals' conclusion, we do not agree that references in RCW 49.46.005 to employment within the state of Washington mean that overtime must be paid only with respect to total hours worked within the state's borders. Rather, the legislature's policy declaration in RCW 49.46.005 describes the purpose of the MWA and speaks to the importance of minimum wage protections for Washington employees in order to encourage Washington employment

opportunities. The act's purpose does not depend on the work itself being performed within this state.

Moreover, the pertinent references in the statute are similar to those we addressed in *Burnside v. Simpson Paper Co.*, 123 Wash.2d 93, 99, 864 P.2d 937 (1994), where an employer argued that an employee could not sue the employer under the Washington Law Against Discrimination (WLAD) because RCW 49.60.010 provides that the purpose of the act is to prevent discrimination against any of the state's "inhabitants" and the employee was not an "inhabitant." We rejected this argument because the fundamental purpose of the WLAD is to prevent discrimination, and limiting the act to inhabitants would contravene that purpose by allowing discrimination against noninhabitants. Here, the purposes of the MWA would be contravened if RCW 49.46.005 is construed to exempt Washington-based employees who work out of state.

Moreover, "[s]tatutes should be interpreted to further, not frustrate, their intended purpose." *Burnside*, 123 Wash.2d at 99, 864 P.2d 937. Washington has a "long and proud history of being a pioneer in the protection of employee rights." *Drinkwitz*, 140 Wash.2d at 300, 996 P.2d 582. A restrictive reading of the declaration section and overtime provisions of the MWA would be inconsistent with protecting workers and, specifically, would be inconsistent with the protections afforded Washington employees under the MWA. *See Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wash.2d 29, 34, 35, 42 P.3d 1265 (2002) (remedial statutes in Title 49 RCW should be liberally construed to carry out

the legislature's goal of protecting employees' wages and assuring payment).

Finally, we must bear in mind that the act is remedial and its exemptions must be "narrowly construed and applied only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation." *Drinkwitz,* 140 Wash.2d at 301, 996 P.2d 582; *accord Strain v. W. Travel, Inc.* 117 Wash.App. 251, 254, 70 P.3d 158 (2003). Interpreting the word "hours" in RCW 49.46.130(1) and (2)(f) to mean "hours worked in Washington State" is neither plainly nor unmistakably consistent with the language in RCW 49.46.130(1) or the spirit of the MWA's minimum wage levels for Washington employees. Additionally, the rule of liberal construction means that the coverage provisions of the MWA must be liberally construed in favor of the employee. *Int'l Ass'n of Fire Fighters,* 146 Wash.2d at 34, 42 P.3d 1265.

Considering the plain language of RCW 49.46.130(1), RCW 49.46.130(2)(f), and RCW 49.46.005, we conclude that the trial court correctly determined that all hours of work must be considered, whether worked within this state or not, when determining overtime due a Washingtonemployee. Here, Mr. Bostain was a Washington employee. Under RCW 49.46.130(1) he is entitled to overtime for the hours he worked in excess of 40 per week.[5]

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5. Whether overtime under RCW 49.46.130(1) must be paid for an employee as a Washington-based employee will depend on factors that courts routinely use for deciding choice of laws issues. This is discussed further below.

Appendix A

Normally we would end the analysis here because the statutes unambiguously require overtime in the circumstances here. However, Food Express maintains, and the Court of Appeals held, that two administrative rules demand a different result. The short answer to this claim is that even if the administrative rules provide that for overtime purposes "hours worked" means "hours worked in Washington," they do not alter the analysis because an administrative rule is invalid and unenforceable if it contravenes the statute which it implements.

The two rules at issue are WAC 296-128-011 and WAC 296-128-012. These rules were adopted in 1989, the same year that the exemption in RCW 49.46.130(2)(f) was enacted. This statutory provision and these administrative rules were responses to this court's holdings in *Department of Labor & Industries v. Common Carriers, Inc.*, 111 Wash.2d 586, 762 P.2d 348 (1988), (a) that the FMCA does not preempt Washington's MWA and (b) that the overtime provisions of the MWA apply to employees of an interstate trucking company. Prior to *Common Carriers*, the Department had required that overtime was due only if the employee worked over 50 percent of the time in Washington. *See Dep't of Labor & Indus. v. Overnite Transp. Co.*, 67 Wash.App. 24, 32-33, 834 P.2d 638 (1992). The Court of Appeals subsequently explained that in *Common Carriers* this court "applied the overtime provisions of the WMWA to interstate motor carriers without reference to the percent of time an employee worked in Washington." *Id.*

WAC 296-128-011, titled "Special recordkeeping requirements," provides that employers employing truck

drivers subject to the FMCA "shall maintain records indicating the base rate of pay, the overtime rate of pay, the hours worked by each employee for each type of work, and the formulas and projected work hours used to substantiate any deviation from payment on an hourly basis." The WAC additionally provides that "[f]or the purposes of this section . . . '[o]vertime rate of pay' means the amount of compensation paid for hours worked *within the state of Washington in excess of forty hours per week* and shall be at least one and one-half times the base rate of pay." WAC 296-128-011(1) (emphasis added). The rule also provides that "[t]he records required by this section shall be made available" at the request of the Department of Labor and Industries and that employees and job applicants may obtain an employer's formula, base rate of pay, and overtime rate of pay. WAC 296-128-011(2).

WAC 296-128-012 implements RCW 49.46.130's requirement that the compensation scheme for a driver subject to the FMCA must include overtime pay at least reasonably equivalent to that required by the statute. The part of the rule heavily relied on by Food Express states that this overtime pay is for "*working within the state of Washington in excess of forty hours a week.*" WAC 296-128-012(1)(a) (emphasis added). The rule contains detailed instructions for how to meet the "reasonably equivalent" compensation requirement and a formula for use in substantiating "any deviation from payment on an hourly basis." *Id.* The rule refers to work within the state several times, each time in conjunction with rates of pay and permissible formulas for equivalent compensation.

Appendix A

As mentioned, the Bostains contend these two administrative rules apply only where the employer pays overtime in the form of "reasonably equivalent" compensation. Because Mr. Bostain was not paid reasonably equivalent compensation, they reason, the Court of Appeals should not have applied the definition of hours worked found in WAC 296-128-011. Food Express complains, however, that if the rules are applied only where the employer uses a "reasonably equivalent" form of compensation for overtime, workers will be treated differently under the Bostains' theory. That is, workers will receive different pay arrangements solely because their employers utilize a different method of payment.

We reject both of these arguments. Contrary to the Bostains' contention, WAC 296-128-011 contains nothing that limits its application to workers who are paid under a "reasonably equivalent" compensation scheme of overtime. Contrary to Food Express's contention, a holding that Mr. Bostain is entitled to overtime compensation does not require different treatment of workers paid on an hourly basis for both base pay and overtime and workers whose overtime is calculated under a "reasonably equivalent" compensation method. Instead, a worker must be paid an amount equal to one and one-half times the hourly rate or be provided reasonably equivalent compensation. Thus, the workers must receive overtime pay that is commensurate.

Moreover, and more importantly, rules that are inconsistent with the statutes they implement are invalid. An agency's rule is invalid if it is not reasonably consistent with the statute being implemented. *See, e.g., Campbell v.*

Dep't of Soc. & Health Servs., 150 Wash.2d 881, 892, 83 P.3d 999 (2004). The Department's rules defining hours for purposes of overtime provisions as hours worked within Washington's borders are not consistent with the plain language of the statutes being implemented, nor with the stated purposes of the MWA, nor with the principles that apply to interpretation of remedial legislation governing payment of wages in this state, as explained above.

The Department of Labor and Industries argued to the Court of Appeals, however, that the trial court should have followed the agency's regulation defining hours as those worked in Washington because while the statutes do not explicitly address the location of hours worked, the Department has addressed this issue and therefore its rule should be followed. Further, the Department maintains, the legislature "has demonstrated its approval" by not changing the agency's approach. Br. of Amicus Curiae Dep't of Labor & Indus. at 6.

This court has the ultimate authority to interpret a statute, and deference is accorded an agency's interpretation only if (1) the particular agency is charged with the administration and enforcement of the statute, (2) the statute is ambiguous, and (3) the statute falls within the agency's special expertise. *See Edelman v. State ex rel. Pub. Disclosure Comm'n*, 152 Wash.2d 584, 590, 99 P.3d 386 (2004); *Port of Seattle v. Pollution Control Hr'g's Bd.*, 151 Wash.2d 568, 587, 90 P.3d 659 (2004); *Pub. Util. Dist. No. 1 of Pend Oreille County v. Dep't of Ecology*, 146 Wash.2d 778, 790, 51 P.3d 744 (2002); *Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council*, 129 Wash.2d 787, 799, 920 P.2d 581

(1996); *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 813-14, 828 P.2d 549 (1992). Here, we conclude that RCW 49.46.130(1) and (2)(f) are not ambiguous with regard to hours worked for purposes of determining when overtime compensation is due. Accordingly, no deference is due the agency's interpretation, regardless of whether it is stated in an agency rule.[6] Moreover, deference to an agency's interpretation is never appropriate when the agency's interpretation conflicts with a statutory mandate, and "legislative acquiescence can never be interpreted as permission to ignore or violate statutory mandates." *Cockle v. Dep't of Labor & Indus.*, 142 Wash.2d 801, 812, 16 P.3d 583 (2001). Thus, the fact that the legislature has not acted to correct the Department's rule is irrelevant.[7]

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6. The Court of Appeals concluded that it could "use WAC 296-128-011 as an aid in determining the legislative intent of RCW 49.46.130" because "the [Department's] interpretation of RCW 49.46.130 does not conflict with the legislative intent." *Bostain*, 127 Wash.App. at 507, ¶ 22, 111 P.3d 906. Aside from the obvious circularity of this conclusion, the court erroneously believed that, without more, "the [Department's] interpretation of the statute" was entitled to great weight "absent a compelling indication that its interpretation conflicts with the legislative intent." *Id.* at 506, ¶ 22, 111 P.3d 906 (citing *Wash. Water Power Co. v. Wash. State Human Rights Comm'n*, 91 Wash.2d 62, 68-69, 586 P.2d 1149 (1978)). However, the correct principle stated in the cited case is, as explained above, that deference to an agency interpretation is appropriate only if the statute is ambiguous and only if the agency is charged with the statute's implementation. *Wash. Water Power Co.*, 91 Wash.2d at 68-69, 586 P.2d 1149.

7. Food Express's reliance on a letter from a Department employee concerning whether Bostain was owed overtime pay is (Cont'd)

Next, the parties have debated the effect of the decisions in *Overnite Transportation* and *Common Carriers*. In *Common Carriers*, although we noted that the employee worked entirely within Washington, we did not base our holdings that the MWA is not preempted by the FMCA and that the MWA applies to interstate truckers on that fact.[8] In *Overnite Transportation* the Court of Appeals held that the MWA was not preempted by the FMCA (rejecting the arguments that *Common Carriers* was distinguishable or incorrect); that the MWA did not violate the commerce clause; and that the Department of Labor and Industries did not violate the Administrative Procedure Act when it adopted the rule applying the MWA to interstate motor carriers. The parties in *Overnite Transportation* stipulated that the employees were employed within the state and were not paid overtime. *Overnite Transp.*, 67 Wash.App. at 28, 834 P.2d 638. Neither case controls or precludes our holding here that the WMA unambiguously requires that overtime be paid to a Washington employee based on all hours worked.

Next, we discuss Food Express's claim that if RCW 49.46.130 is interpreted to apply to all hours worked, it violates the commerce clause. A claim that a statute is

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misplaced, as the Court of Appeals recognized. The employee's subjective understanding of the agency's intent is not a formal administrative decision entitled to any weight. *See City of Sunnyside v. Fernandez*, 59 Wash.App. 578, 581, 799 P.2d 753 (1990).

8. The Court of Appeals erroneously said that we "held that RCW 49.46.130 did *not* apply." *Bostain*, 127 Wash.App. at 507, ¶ 24, 111 P.3d 906 (emphasis added).

unconstitutional must be proven by the challenger beyond a reasonable doubt. *State v. Heckel,* 143 Wash.2d 824, 832, 24 P.3d 404 (2001). The commerce clause grants Congress the power to regulate interstate commerce. U.S. Const. art. I, § 8, cl. 3. Implicit in this grant of power is the "dormant" commerce clause, i.e., the premise that a state intrudes on this power if it enacts a law that unduly burdens interstate commerce. *Heckel,* 143 Wash.2d at 832, 24 P.3d 404. 'This "negative" aspect of the Commerce Clause prohibits economic protectionism-that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.' " *W. Lynn Creamery, Inc. v. Healy,* 512 U.S. 186, 192, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994) (quoting *New Energy Co. of Ind. v. Limbach,* 486 U.S. 269, 273-74, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988)).

The initial question is whether the state law affecting interstate commerce "facially regulates or discriminates against interstate commerce, or has the direct effect of favoring in-state economic interests over out-of-state interests." *Mt. Hood Beverage Co. v. Constellation Brands, Inc.,* 149 Wash.2d 98, 110, 63 P.3d 779 (2003) (citing *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.,* 476 U.S. 573, 578-79, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986)). A state law affecting interstate commerce that does neither of these things is generally upheld unless it places a burden on interstate commerce that outweighs the benefits from the law: where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local

purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved and on whether it could be promoted as well with a lesser impact on interstate activities. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

As interpreted to include hours worked both in and out of state, RCW 49.46.130 is not facially discriminatory because it does not openly discriminate against interstate commerce in favor of intrastate economic interests. Nor does the statute have a direct effect of favoring in-state interests; rather, it treats both evenhandedly. *See Heckel*, 143 Wash.2d at 833, 24 P.3d 404.

Accordingly, we turn to the balancing test required under *Pike*. Assuring proper compensation for Washington employees is an important legitimate local interest served by the overtime provisions of the MWA. *See* RCW 49.46.005 (MWA purpose is to establish minimum standards of employment and to encourage employment opportunities within Washington State); *see also, e.g., Int'l Ass'n of Fire Fighters*, 146 Wash.2d at 35, 42 P.3d 1265 (statutes in Title 49 RCW should be liberally construed to carry out the legislature's goal of protecting employees' wages and assuring payment); *Drinkwitz*, 140 Wash.2d at 300, 996 P.2d 582 (noting State's long history of protecting employees' rights and the legislature's concern for the welfare of Washington's work force).

Food Express has offered no persuasive argument that this local interest is outweighed by any burden on interstate

commerce, and we perceive none. In relevant part, the MWA regulates only employers who are doing business in Washington and who have hired Washington-based employees. Employers will need to identify those employees who are subject to Washington's MWA and keep track of total hours, but we do not believe either of these requirements constitutes an impermissible burden on interstate commerce.

Two additional components of the analysis are whether the state law creates inconsistency among the states and whether the statute regulates conduct occurring wholly out of the state. *Heckel,* 143 Wash.2d at 837, 24 P.3d 404. The inconsistent-regulations test and the extraterritoriality analysis are facets of the *Pike* test above. *Id.* at 838, 24 P.3d 404. As to the first of these components, if the law in question merely creates additional but not irreconcilable obligations, they are not to be considered inconsistent for dormant commerce clause analysis. *Id.* (citing *Instructional Sys., Inc. v. Computer Curriculum Corp.,* 35 F.3d 813, 826 (3d Cir.1994)). Rather, if the states have enacted different overtime statutes, the question is whether this "create[s] compliance costs that are 'clearly excessive in relation to the putative local benefits.' " *Heckel,* 143 Wash.2d at 838, 24 P.3d 404 (quoting *Pike,* 397 U.S. at 142, 90 S.Ct. 844).

Food Express has not established that MWA's overtime provisions create irreconcilable obligations. The Bostains, on the other hand, make a strong argument that if an employer is subject to the MWA for an employee's wages, that employer would not be required, under a choice of laws analysis, to comply with another state's wage and hour statutes as to that employee.

Appendix A

As to extraterritoriality, the United States Supreme Court has invalidated statutes that regulate the out-of-state conduct of business. For example, in *Edgar v. MITE Corp.*, 457 U.S. 624, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982), the Court found unconstitutional an Illinois law that regulated, beyond its borders, tender offers for the purchase of stock in corporations. In two cases the Court has found violations of the commerce clause where state laws had the practical effect of controlling the price of alcoholic beverages in other states. *Brown-Forman Distillers*, 476 U.S. 573, 106 S.Ct. 2080, 90 L.Ed.2d 552; *Healy v. Beer Institute*, 491 U.S. 324, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989).

Here, the Bostains point out, overtime under the MWA applies to Washington-based employees, and it is difficult to conceive of circumstances where one who does not qualify as the employer of a Washington-based employee would be subject to the MWA's overtime pay regulations. In *Haberman v. Washington Public Power Supply System*, 109 Wash.2d 107, 744 P.2d 1032, 750 P.2d 254 (1987) we rejected a commerce clause challenge to the Securities Act of Washington (WSSA), chapter 21.20 RCW. We noted, among other things, that the "application of the WSSA . . . is based on the substantial relationship between the subject matter, the parties, and the forum state" and there was no attempt to apply the state law "to transactions completely unrelated to Washington." *Haberman*, 109 Wash.2d at 135-36, 750 P.2d 254. The same is true here. Food Express has shown no " 'sweeping extraterritorial effect' that would outweigh the local benefits" of the MWA. *Heckel*, 143 Wash.2d at 839, 24 P.3d 404 (quoting *Edgar*, 457 U.S. at 642, 102 S.Ct. 2629).

Finally, we believe that any impact of the MWA on interstate commerce does not rise to the level of an impermissible burden, given the importance of the legitimate local public interest at stake.

Amici curiae Washington Trucking Associations/ American Trucking Associations, Inc. contend, however, that application of state laws like the MWA would throw trucking operations into financial turmoil and compromise safety by requiring carriers, because of financial considerations, to adopt artificial hourly limits inconsistent with the carriers' operational needs. These amici also refer to the possibility of inconsistent state regulations respecting driver eligibility for overtime.

We are not convinced that a commerce clause violation occurs when an employer is subject to additional expense, but, even more, we are not convinced that safety is compromised by application of laws like the MWA. The FMCA regulates the total number of hours that a driver can be on the road, assuring that safety concerns are met. As to potentially inconsistent state laws respecting overtime, this claim implicates choice of law questions that routinely arise. As the Bostains maintain, if the employee is a Washington-based employee subject to Washington's MWA, the employer is not likely to be subject to the wage and hour statutes of another jurisdiction with respect to that employee.[9]

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9. Amici Washington Trucking Associations/American Trucking Associations, Inc. maintain that if RCW 49.46.130 is interpreted to require overtime in this case, the statute would be preempted by the Federal Aviation Administration Authorization Act (FAAA) of 1994, (Cont'd)

Food Express has not sustained the burden of overcoming the presumption that RCW 49.46.130, as we interpret it here, is constitutional.

Next, we turn to the question of attorney fees. Attorney fees were requested under RCW 49.46.090(1), RCW 49.48.030, and RCW 49.52.070. The trial court calculated fees in the amount of $135 per hour for 170.2 hours, for a

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49 U.S.C. §§ 14501-14505. The FAAA's preemption clause provides that a state may "not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). Amici rely heavily on *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992), in which the Court gave a broad interpretation to an identical preemption clause in the Airline Deregulation Act (ADA), Pub.L. No. 95-504, 92 Stat. 1705. Amici fail to note, however, that the Court has since pulled back from its previous interpretation. *See generally Californians for Safe & Competitive Dump Truck Trans. v. Mendonca*, 152 F.3d 1184, 1187-89 (9th Cir.1998) (explaining evolution of the Court's interpretation of the preemption clause). Applying the more recent cases interpreting the preemption clause, the Ninth Circuit in *Mendonca* held that California's prevailing wage statute was not preempted by the FAAA. The California court reasoned that although the prevailing wage law was "in a certain sense" " 'related to' [the appellants'] prices, routes and services, . . . the effect is no more than indirect, remote, and tenuous." *Id.* at 1189 (citing *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997)). We conclude that just as the prevailing wage statute in *Mendonca* was not preempted, RCW 49.46.130(1)'s overtime provision, as interpreted to require overtime in this case, is not preempted by the FAAA.

total of $22,977, and then reduced the amount to $15,000. The trial court reduced the lodestar amount based on its determinations that there was a bona fide dispute as to whether Food Express was liable for overtime wages, the issues presented in this case are unsettled and are a matter of first impression, and the size of the award for overtime wages. The Bostains maintain these factors do not justify a decrease, and that in particular the first two of these reasons favor an increase in attorney fees rather than a decrease. The Bostains also ask for a 1.5 multiplier.

We agree that the reasons given by the trial court are not factors that support a reduction in the lodestar amount under the facts of this case. *See Bowers v. Transamerica Title Ins. Co.*, 100 Wash.2d 581, 596-99, 675 P.2d 193 (1983). We remand, with directions to the trial court to determine, on remand, whether a multiplier is appropriate, in light of our conclusion that the factors previously relied on do not support a reduction in the lodestar amount.

The Bostains have also requested fees under RCW 49.46.090(1) and RCW 49.48.030 in the Court of Appeals and in this court. We award the Bostains attorney fees under these statutes for the appeal and for this discretionary review, with the amount to be determined by the trial court on remand.

The Bostains seek double damages pursuant to chapter 49.52 RCW. We conclude that the trial court correctly denied this request on the ground that there was a bona fide dispute as to whether the overtime provision in RCW 49.46.130 applies to all hours worked by interstate truck drivers. The

trial court said that the law on the issue of out-of-state hours was unsettled, and noted that Food Express had been advised in a February 2003 letter from an employee of the Department of Labor and Industries that no overtime was due to an interstate truck driver who did not work more than 40 hours a week in Washington.

Finally, the parties raised additional issues in the Court of Appeals that were not necessary to that court's decision. Pursuant to RAP 13.7(b), we decide them in this opinion. First, Food Express contends that the award of prejudgment interest is improper because Food Express did not admit liability and the parties dispute the number of hours worked.

The trial court properly awarded prejudgment interest because the claim for overtime was a liquidated claim. A liquidated claim is one where the amount of prejudgment interest can be determined from the evidence with exactness and without reliance on opinion or discretion. *Hansen v. Rothaus,* 107 Wash.2d 468, 472, 730 P.2d 662 (1986) (citing *Prier v. Refrigeration Eng'g Co.,* 74 Wash.2d 25, 32, 442 P.2d 621 (1968)). "A dispute over the claim, in whole or in part, does not change the character of a liquidated claim to unliquidated." *Hansen,* 107 Wash.2d at 472, 730 P.2d 662 (citing Charles T. McCormick, Handbook on the Law of Damages § 54 (1935)). The Bostains submitted objective evidence of the overtime due and the basis for their calculations. Once the determination is made that overtime is due Mr. Bostain, the amount of prejudgment interest can be determined from the evidence with exactness. Accordingly, the trial court did not err in awarding prejudgment interest.

Second, Food Express maintains that the trial court erred in dismissing its affirmative estoppel defense. Food Express's argument on this issue is somewhat unclear, but it seems to be that by accepting pay without overtime for 10 years without complaint, Mr. Bostain is estopped from claiming that Food Express owes any additional amount for overtime. Food Express also claims that the Bostains' suit is in retaliation for his dismissal and evidently believes this is another reason that supports an estoppel defense. Food Express cites no authority that supports its argument, and the Bostains have provided authority to the contrary. *See Cannon v. Miller,* 22 Wash.2d 227, 238-39, 155 P.2d 500 (1945), *overruled on other grounds, Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.,* 139 Wash.2d 824, 991 P.2d 1126, 1 P.3d 578 (2000) (fact that employees accepted checks for lesser amounts did not preclude them from collecting amounts due them for overtime under the federal Labor Standards Act, and employer could not assert an estoppel defense because it would permit the employer to relieve itself of liability imposed on the employer because of its violation of the law). Further, Food Express cites no evidence in the record in support of its claim that the Bostains' suit is retaliatory and no authority for the proposition that this would make any difference as to Mr. Bostains' entitlement to overtime.

CONCLUSION

The overtime provisions of RCW 49.46.130 apply to all hours worked by a Washington-based truck driver engaged in interstate transportation, whether within Washington State or outside the state. We reverse the Court of Appeals and

remand to the trial court for recalculation of attorney fees due for the trial, and for determination of attorney fees for the appeal and for this discretionary review.

AUTHOR:
Justice Barbara A. Madsen

WE CONCUR:
Chief Justice Gerry L. Alexander
Justice Tom Chambers
Justice Charles W. Johnson
Justice Mary E. Fairhurst

Appendix A

No. 77201-1

J.M. JOHNSON, J. (dissenting) — The majority declares that a truck driver who never worked more than 40 hours per week in Washington is entitled to years of overtime for driving in other states: "all hours of work must be considered, whether worked within this state or not, when determining overtime due a Washington employee." Majority at 852. This holding contradicts the plain language of the Washington Minimum Wage Act (MWA), chapter 49.46 RCW, that act's statement of purpose, and an interpretive administrative rule, and runs afoul of the Commerce Clause. The majority's decision also threatens to subject an important industry to the vagaries of a choice of laws analysis regarding a key business decision. Therefore, I must dissent.

I. Relevant Facts and Provisions of Law

For 10 years Food Express, Inc. employed Larie Bostain as an interstate truck driver, driving in the states of Washington, Oregon, Idaho, and California. Majority at 849. Food Express informed Bostain from the beginning of his employment that he would not be entitled to overtime, and Food Express never paid Bostain any overtime wages. Majority at 849.

Years later, having been fired by Food Express for other reasons, Bostain now claims that he is entitled to overtime wages pursuant to RCW 49.46.130(1). Majority at 849. However, our statute, RCW 49.46.130(1), requires overtime only for workers who work over 40 hours per week within the state of Washington. Because the majority reaches a

different result, applying Washington law to hours worked in Oregon, Idaho, and California, I dissent.

The statute at issue is RCW 49.46.130, titled "Minimum rate of compensation for employment in excess of forty hour work week-Exceptions." RCW 49.46.130(1) provides that employees who work more than 40 hours per week are entitled to overtime unless a listed exception applies (see full text, *infra*). Neither this court nor the Court of Appeals has addressed whether RCW 49.46.130(1) requires overtime only where employees have worked more than 40 hours per week within the state of Washington. Two earlier cases considering the statute are not dispositive of this issue. Majority at 854-55. *Dep't of Labor & Indus. v. Common Carriers, Inc.*, 111 Wash.2d 586, 762 P.2d 348 (1988); *Dep't of Labor & Indus. v. Overnite Transp. Co.*, 67 Wash.App. 24, 834 P.2d 638 (1992), *review denied*, 120 Wash.2d 1030, 847 P.2d 481 (1993).

RCW 49.46.130(1) does not explicitly address whether the "hours" relevant to the determination of overtime compensation are limited to hours worked within the state of Washington. Rather, as evidenced by the conflicting decisions below, RCW 49.46.130(1) is subject to more than one reasonable interpretation on this point. Given this ambiguity, Food Express correctly argues that other sections of the statute and relevant administrative rules may be used to interpret RCW 49.46.130(1).[1] Viewed together, these

1. While I reach the same conclusion in this dissent as was reached by the Court of Appeals, my rationale is different in that I conclude RCW 49.46.130(1) is ambiguous regarding the central (Cont'd)

provisions compel the conclusion that employees must be paid overtime under RCW 49.46.130(1) based only on hours worked within the state of Washington.

II. Rules for Statutory Interpretation

Statutory interpretation is a question of law that this court reviews de novo. *Philippides v. Bernard*, 151 Wash.2d 376, 383, 88 P.3d 939 (2004). "The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose." *In re Parentage of J.M.K.*, 155 Wash.2d 374, 387, 119 P.3d 840 (2005). To reach this goal, this court considers first the plain language of the statute. This analysis includes examination of "the statute as a whole, giving effect to all that the legislature has said, and ... using related statutes to help identify the legislative intent embodied in the provision in question." *Id.*

If, after this analysis, the statute is still subject to more than one reasonable interpretation, it is ambiguous. *State v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d 1, 12, 43 P.3d 4 (2002). In determining legislative purpose and intent of an ambiguous statute, this court may look beyond the language

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(Cont'd)

issue. *See Bostain v. Food Express, Inc.*, 127 Wash.App. 499, 506, 111 P.3d 906 (2005); *but see Bostain*, 127 Wash.App. at 511, 111 P.3d 906 (Morgan, J., concurring). This ambiguity makes it appropriate to look to related administrative rules as well as the statute's legislative history for guidance in interpreting RCW 49.46.130(1). *City of Pasco v. Pub. Employment Relations Comm'n*, 119 Wash.2d 504, 509, 833 P.2d 381 (1992); *State v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d 1, 12, 43 P.3d 4 (2002).

of the act to its legislative history. *Id.* Useful legislative history materials may include bill reports. *State v. Reding*, 119 Wash.2d 685, 690, 835 P.2d 1019 (1992). Additionally, in construing an ambiguous statute, this court will "accord great weight to the contemporaneous construction placed upon it by officials charged with its enforcement, especially where the Legislature has silently acquiesced in that construction over a long period." *In re Sehome Park Care Ctr., Inc.*, 127 Wash.2d 774, 780, 903 P.2d 443 (1995).

While "[a]dministrative agencies do not have the power to promulgate rules that would amend or change legislative enactment[,] . . . [a]gency rules may be used to 'fill in the gaps' in legislation if such rules are 'necessary to the effectuation of a general statutory scheme.' " *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wash.2d 637, 646, 62 P.3d 462 (2003) (internal quotation marks and citations omitted) (quoting *Green River Cmty. Coll. v. Higher Educ. Pers. Bd.*, 95 Wash.2d 108, 112, 622 P.2d 826 (1980)). Courts give substantial weight to an agency's interpretation of the statutes it administers. *Manke Lumber Co. v. Diehl*, 91 Wash.App. 793, 802, 959 P.2d 1173 (1998) (citing *Weyerhaeuser Co. v. Dep't of Ecology*, 86 Wash.2d 310, 315, 545 P.2d 5 (1976)). Courts should not defer to an agency's interpretation of a statute if that interpretation conflicts with the statutory mandate. *Cockle v. Dep't of Labor & Indus.*, 142 Wash.2d 801, 812, 16 P.3d 583 (2001).

Appendix A

III. Interpretation of the Overtime Provisions of the Washington Minimum Wage Act

RCW 49.46.130(1) contains no explicit indication that it is limited in application to employees performing work within the state of Washington, but also indicates no intent to apply to hours worked in other states. RCW 49.46.130(1) provides, in relevant part:

> Except as otherwise provided in this section, no employer shall employ any of his employees for a work week longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

While RCW 49.46.130(1) is silent regarding whether an employee must work over 40 hours within the state of Washington to receive overtime pay, RCW 49.46.005 is not silent on this point. RCW 49.46.005 describes the purpose of the entire MWA as follows:

> to establish minimum standards of employment *within the state of Washington* . . . to establish a minimum wage for employees *of this state* to encourage employment opportunities *within the state* . . . . for the purpose of protecting the immediate and future health, safety and welfare of the people of *this state*.

(Emphasis added.)

These repeated references to the MWA's impact on employment matters "within the state" evidence the legislature's intent to focus the impact of the MWA on Washington employees working within the state of Washington.

In an attempt to minimize the impact of this statutory language, the majority analogizes this case to *Burnside v. Simpson Paper Co.*, 123 Wash.2d 93, 864 P.2d 937 (1994). Majority at 851-52. In *Burnside*, this court held that limiting the application of the Washington Law Against Discrimination (WLAD) (chapter 49.60 RCW) in accordance with a literal interpretation of the term "inhabitants" contained in its statement of purpose would contravene the law's fundamental purpose. *Burnside*, 123 Wash.2d at 99, 864 P.2d 937. However, *Burnside* may be distinguished.

As an initial matter, *Burnside* is distinguishable in that the defendant in that case advocated a literal interpretation of a term in WLAD's statement of purpose in order to limit the court's subject matter jurisdiction to enforce the act. *Id.* at 98, 864 P.2d 937. No such jurisdictional challenge is mounted in the present case. More importantly, unlike in *Burnside*, limiting the application of the MWA in accordance with its focus on employees working within the state of Washington in no way impairs the MWA's fundamental purpose. Interpreting the word "hours" in RCW 49.46.130(1) to mean "hours worked in Washington State" is "plainly . . . consistent with . . . the spirit of the MWA[ ]," as evidenced by the plain language of RCW 49.46.005. Majority at 852. Furthermore, while the majority is correct that, as a general proposition, remedial statutes are to be liberally construed,

this rule does not require that a statute be stretched beyond its express purpose (here stretched to apply Washington law outside the state's borders). Majority at 10-11.

The legislature's intent to focus the benefits of the MWA in general, and its overtime provision in particular, on employees working within the state of Washington is further confirmed by a long-standing administrative rule promulgated by the Department of Labor and Industries (DLI): WAC 296-128-011. This rule was adopted in 1989 with reference to RCW 49.46.130(2)(f) and this court's decision in *Common Carriers*, 111 Wash.2d 586, 762 P.2d 348.[2] Majority at 852-53. However, as the majority concedes,

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2. The federal Fair Labor Standards Act (FLSA), 29 U.S.C. § 213(b)(1), exempts from federal overtime compensation interstate truck drivers under the Federal Motor Carrier Act (FMCA) (49 U.S.C. § 31501-31504). In *Common Carriers*, this court held that the FMCA did not preempt the MWA's overtime wage provisions. 111 Wash.2d at 590, 762 P.2d 348. The effect of this holding was to subject interstate truck drivers in Washington to an overtime scheme, namely, RCW 49.46.130(1). To reverse this result, the legislature adopted the exemption in (2)(f):

> (2) This section [RCW 49.46.130(1)] does not apply to:
>
> . . . .
>
> (f) An individual employed as a truck or bus driver who is subject to the provisions of the Federal Motor Carrier Act [49 U.S.C. § 31501 et seq.], if the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to that required by this subsection, for working longer than forty hours per week. . . .

(Cont'd)

Appendix A

WAC 296-128-011 is not limited in application to workers covered by the (2)(f) exemption to RCW 49.46.130(1). Majority at 853. On its face, the rule is broadly applicable. Thus, it may be used to help resolve the ambiguity in RCW 49.46.130(1) regarding the "hours" relevant to computing overtime compensation for employees covered by the FMCA.

WAC 296-128-011, titled "Special recordkeeping requirements," provides:

> (1) In addition to the records required by WAC 296-128-010, *employers who employ individuals as truck or bus drivers subject to the provisions of the Federal Motor Carrier Act* shall maintain records indicating the base rate of pay, the overtime rate of pay, the hours worked by each employee for each type of work, and the formulas and projected work hours used to substantiate any deviation from payment on an hourly basis pursuant to WAC 296-128-012. The records shall indicate the period of time for which the base rate of pay and the overtime rate of pay are in effect.
>
> For the purposes of this section and WAC 296-128-012, "base rate of pay" means the amount

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(Cont'd)
Laws of 1989, ch. 104, § 1; Final Legislative Report, 51st Leg., at 267 (Wash.1989). While Bostain is a truck driver subject to the FMCA, he does not come within the (2)(f) exemption because Food Express did not provide him with overtime compensation or its reasonable equivalent. Since Bostain does not come within the (2)(f) exemption, RCW 49.46.130(1) applies.

> of compensation paid per hour or per unit of work in a workweek of forty hours or less. . . . "*Overtime rate of pay*" *means the amount of compensation paid for hours worked* ***within the state of Washington*** *in excess of forty hours per week* and shall be at least one and one-half times the base rate of pay.

(emphasis added). WAC 296-128-011 confirms that to receive overtime under RCW 49.46.130(1), an employee must work more than 40 hours per week within the state of Washington.

The majority does not attempt to reconcile the language of the above rule with its decision that RCW 49.46.130(1) applies to all "Washington-based" employees who work any hours at all within the state of Washington. Rather, the majority simply disregards the rule altogether. First, the majority justifies its decision to ignore this rule by claiming that RCW 49.46.130(1) is not ambiguous. Majority at 854. Second, the majority reasons that the above rule is inapposite because it is "inconsistent with the statutes [it] implement[s]." Majority at 853. The majority is wrong on both counts. Accordingly, the majority also erred in not deferring to the reasoned interpretation of RCW 49.46.130(1) by DLI.

Deference is accorded an agency's interpretation of a statute only if "(1) the particular agency is charged with the administration and enforcement of the statute, (2) the statute is ambiguous, and (3) the statute falls within the agency's special expertise." Majority at 854 (citing *Edelman v. State ex rel. Pub. Disclosure Comm'n,* 152 Wash.2d 584, 590, 99

P.3d 386 (2004); *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wash.2d 568, 587, 90 P.3d 659 (2004); *Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council*, 129 Wash.2d 787, 799, 920 P.2d 581 (1996)) (other citations omitted). The majority does not dispute that DLI is charged with the administration and enforcement of the MWA or that the statute falls with DLI's special expertise.[3] Rather, the majority concludes that deference to DLI's rule is unnecessary because RCW 49.46.130(1) is "not ambiguous with regard to hours worked for purposes of determining when overtime compensation is due." Majority at 854.

As noted above, a statute is ambiguous if it is subject to more than one reasonable interpretation. *Campbell & Gwinn*, 146 Wash.2d at 12, 43 P.3d 4. Here, RCW 49.46.130(1) has in fact been subject to more than one reasonable interpretation regarding overtime hours as evidenced by the conflicting decisions of the trial court and Court of Appeals. *Bostain*, 127 Wash.App. at 501, 504, 111 P.3d 906. Moreover, Bostain himself has apparently switched views as to the meaning of the term given that he made no claim for overtime during the 10 years he was employed by Food Express. In sum, there

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3. DLI has the authority to supervise, administer, and enforce all laws pertaining to employment, including wage and hour laws. RCW 43.22.270. Moreover, the determination of the meaning of particular terms within the MWA's overtime compensation provisions is within DLI's specialized expertise. *Cf. Schneider v. Snyder's Foods, Inc.*, 116 Wash.App. 706, 717, 66 P.3d 640, *rev. denied*, 150 Wash.2d 1012, 79 P.3d 446 (2003) (concluding that "determination of whether a compensation scheme constitutes the reasonable equivalent of statutory overtime is within the Department's specialized expertise").

can be no real dispute that reasonable minds have differed, and continue to differ, as to the meaning of RCW 49.46.130(1)'s reference to "hours" for purposes of overtime compensation. *Bostain,* 127 Wash.App. at 511, 111 P.3d 906 (Morgan, J., concurring). Accordingly, the three part test for deference to an agency's interpretation of a statute is satisfied here and this court should be guided in deciding the present case by WAC 296-128-011. *Cf. Inniss v. Tandy Corp.,* 141 Wash.2d 517, 529, 7 P.3d 807 (2000) (relying, in part, on the DLI's interpretation of term "regular rate" as used in RCW 49.46.130(1)).

In addition to asserting that RCW 49.46.130(1) is not ambiguous, the majority argues that it may ignore WAC 296-128-011 because the rule is "inconsistent with the statutes [it] implement[s]." Majority at 853. This alleged inconsistency arises from the fact that DLI's rule explicitly defines the term "hours" for overtime purposes as limited to hours worked within the state of Washington, while RCW 49.46.130(1) does not contain a similar limitation. *Id.* Yet, further refining the meaning of statutory terms used, but not defined, in the MWA is precisely the function which DLI's rules are meant to perform. *Edelman,* 152 Wash.2d at 590, 99 P.3d 386 ("An agency charged with the administration and enforcement of a statute may interpret ambiguities within the statutory language through the rule-making process."). There is no irreconcilable conflict between the plain language of RCW 49.46.130(1) and that of WAC 296-128-011. Rather, the latter provision simply serves to interpret the former, in accordance with DLI's authority and expertise. Accordingly, the majority errs in refusing to look to WAC 296-128-011 for guidance in reaching its decision in this case. *See In re*

Sehome Park Care Ctr., 127 Wash.2d at 780, 903 P.2d 443 ("In interpreting a statute, we accord great weight to the contemporaneous construction placed upon it by officials charged with its enforcement. . . .").

Furthermore, it should be noted that the legislature has not changed the regulatory scheme for interstate truck drivers since WAC 296-128-011 was adopted in 1989. In other words, for the past 15 years, the legislature has acquiesced in the DLI's approach to defining "hours" for purposes of awarding overtime compensation under RCW 49.46.130(1). Contrary to the suggestions of the majority, majority at 854, this legislative acquiescence is relevant to this court's decision. *See In re Sehome Park Care Ctr.*, 127 Wash.2d at 780, 903 P.2d 443 (stating that this court will give "great weight" to agency construction "especially where the Legislature has silently acquiesced in that construction over a long period"); *see also Cockle*, 142 Wash.2d at 834, 16 P.3d 583 (Guy, J., concurring in dissent) (noting that the legislature had "had ample opportunity to clarify the statute [RCW 51.08.178] if it felt that the Department [of Labor and Industries] was misinterpreting it").

In addition, this court must always seek to construe statutes in a manner that avoids constitutional problems. The majority's interpretation of RCW 49.46.130(1) likely runs afoul of the Commerce Clause, U.S. Const. art I, § 8, cl. 3. *See State v. Heckel*, 143 Wash.2d 824, 837, 24 P.3d 404, *cert. denied*, 534 U.S. 997, 122 S.Ct. 467, 151 L.Ed.2d 383 (2001). Implicit in the Commerce Clause is "the principle that the states impermissibly intrude on . . . federal power when they enact laws that unduly burden interstate commerce." *Id.* at

832, 24 P.3d 404. Under the majority's interpretation, **863 RCW 49.46.130(1) violates the Commerce Clause because the burden it imposes on interstate commerce is clearly excessive relative to the MWA's express public purpose. *See id.; see also Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

Interpreting RCW 49.46.130(1) to apply to all hours worked by an employee when those hours are worked outside of Washington means that the MWA will inevitably burden the extraterritorial activities of interstate truck drivers and their employers. For example, a truck driver could work for 15 hours in Washington, 15 hours in Oregon, and 15 hours in California in a single week. Application of RCW 49.46.130(1) in the manner advocated by the majority would require his employer to track and pay overtime related to the driver's hours worked in Oregon and California as well as Washington. Should this driver's employer wish to avoid paying overtime under the MWA, he might move his operation to another state or at least limit the driver's "on duty" hours while the driver engaged in work outside of Washington. Additionally, this employer would be faced with the unenviable task of researching and resolving any conflicts between the overtime laws of Washington, Oregon, and California.[4] In sum, under the majority's interpretation, RCW 49.46.130(1) will unquestionably burden the interstate activities of the trucking industry.

A statute will fail under the *Pike* balancing test and thus violate the Commerce Clause if the burden it imposes on

4. For example, unlike the MWA, Or. Admin. R. 839-20-0125(3) tracks the FLSA exemption for employees subject to the FMCA and, accordingly, does not provide overtime for interstate truck drivers.

interstate commerce is "clearly excessive in relation to the putative local benefits." 397 U.S. at 142. As noted above, the public purpose of the MWA is focused on promoting employment and compensating employees within the state of Washington. Thus, the burden on interstate commerce that will result from the majority's interpretation of RCW 49.46.130(1) is largely unrelated to promotion of the public interests underlying the MWA. Because giving extraterritorial effect to RCW 49.46.130(1) will not actually further the legitimate public interests behind the MWA, the burden the majority imposes is excessive.[5] *See Edgar v. MITE Corp.*, 457 U.S. 624, 642, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982).

Finally, while discarding the bright-line rule regarding overtime compensation for interstate truck drivers that has existed for the past 15 years, the majority offers the trucking industry, its employees, and its customers nothing more than a vague and unpredictable legal future regarding overtime compensation. Specifically, the majority suggests that, following its decision in this case, "[w]hether overtime under RCW 49.46.130(1) must be paid for an employee as a Washington-based employee will depend on factors that courts routinely use for deciding choice of laws issues." Majority at 852 n. 5. The average employer (or trucker) is hardly equipped to perform a choice of laws analysis for every employee potentially considered to be "Washington-based."

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5. While the Court of Appeals held in *Overnite Transp. Co.*, 67 Wash.App. at 32, 834 P.2d 638, that application of the MWA's overtime provisions to interstate motor carriers did not unduly burden interstate commerce, that case was explicitly limited in its analysis to employees working over 40 hours per week within the state of Washington.

See Burnside, 123 Wash.2d at 100, 864 P.2d 937 (discussing Washington's approach to choice of law questions). The rules regarding whether an employee must be paid overtime compensation under the MWA should facilitate the decision-making process on the ground, not hinder it. *See Williams v. W.M.A. Transit Co.*, 153 U.S.App. D.C. 183, 472 F.2d 1258, 1265 (1972) (explaining need for overtime compensation rule "which can be applied with reasonable simplicity by area businessmen"). The majority's "solution" for future overtime compensation decisions will result only in more confusion and litigation regarding whether or not a given interstate trucker is entitled to overtime pay. This was not the legislature's intent in enacting RCW 49.46.130(1). *See Berrocal v. Fernandez*, 155 Wash.2d 585, 595, 121 P.3d 82 (2005) (noting that "the legislature likely did not intend . . . an impractical system" under the overtime provisions of the MWA).

IV. Conclusion

RCW 49.46.130(1) requires overtime compensation only for employees who work over 40 hours per week within the state of Washington. Because Bostain did not work over 40 hours per week within the state of Washington, he is not entitled to overtime compensation.[6] Accordingly, I dissent.[7]

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6. An audit of Bostain's final year of work for Food Express showed that Bostain averaged a total of 48 hours of driving/loading but that he never worked more than 40 hours per week within the state of Washington. Majority at 849.

7. My conclusion regarding the meaning of "hours" for purposes of RCW 49.46.130(1) and, thus, that Food Express should prevail

(Cont'd)

Appendix A

AUTHOR:
Justice Charles W. Johnson

WE CONCUR:
Justice Susan Owens
Justice Richard B. Sanders
Justice Bobbe J. Bridge

(Cont'd)
before this court necessitates that I also dissent from the majority's determination regarding costs and fees. I would affirm the Court of Appeals decision to grant Food Express attorney fees. *Bostain*, 127 Wash.App. at 510, 111 P.3d 906.

APPENDIX B — OPINION OF THE COURT OF APPEALS OF WASHINGTON, DIVISION 2 DATED MAY 17, 2005

COURT OF APPEALS OF WASHINGTON
Division 2

No. 31461-4-II

LARIE E. BOSTAIN and LAURIE JO BOSTAIN, husband and wife,

Respondent/Cross-Appellants.

v.

FOOD EXPRESS, INC., an unregistered corporation,

Appellant/Cross-Respondent,

MARC WIDING, a single man,

Defendant.

May 17, 2005

BRIDGEWATER, J.

Food Express, Inc. appeals from a partial summary judgment for overtime wages due to Larie Bostain. We hold that concerning "overtime" pay using the "plain meaning rule" the Washington Minimum Wage Act (WMWA) applies only to those hours an employee works within the state. Larie Bostain, an interstate truck driver, averaged 48 hours of driving/loading per week, but he did not drive/load more than

40 hours in any work week within Washington State. Because Bostain was not entitled to include the hours he drove outside Washington, he was not entitled to overtime wages, prejudgment interest or attorney fees.[1] We reverse.

Food Express is a motor carrier having its principal office in Arcadia, California. It hauls food products and chemicals in California, Nevada, Idaho, Arizona, Washington, Oregon, and Utah. The majority of its hauling occurs intrastate but some interstate hauling occurs between California and the above listed Western States.

Food Express's operation in Washington consists of a terminal in Vancouver, Washington. It also has approximately five trucks parked in the Seattle area and other trucks located elsewhere in Washington.

Food Express hired Bostain on August 6, 1992, as an interstate driver based at the Vancouver terminal. The company paid his wages on an hourly rate. If he traveled more than 200 miles, then Food Express paid him by the mile. When it hired Bostain, Food Express explained that because of the interstate nature of his driving, it would not pay him overtime. Bostain never objected to this policy while employed at Food Express. Neither did he request or demand payment of overtime wages. He also never pursued a claim with any regulatory agency, including the Washington

1. Food Express alleged in its brief that if it owed Bostain any overtime wages it was for only 2.5 hours. Because neither party briefed or argued this issue, we do not address it. RAP 10.3(a)(5); *R.A. Hanson Co. v. Magnuson*, 79 Wash.App. 497, 505, 903 P.2d 496 (1995), *review denied*, 129 Wash.2d 1010, 917 P.2d 130 (1996).

Department of Labor & Industries (WDLI), regarding overtime wages.

The president of Food Express, Walter Keeney, had spoken with WDLI to determine whether to pay Bostain overtime. After these talks, Food Express determined that it did not have to pay overtime wages to Bostain.

Bostain began and ended his runs from the Vancouver terminal. Food Express terminated Bostain on May 28, 2002, for insubordination asserting he had failed to follow the Food Express dispatcher's instructions and violated U.S. Department of Transportation (DOT) safety standards. Bostain had picked up a load of cargo late in the afternoon on May 23, in Eugene, Oregon. If he had continued to drive his load, he would have exceeded his DOT daily allowance of hours for truck drivers. His dispatcher told him to get a motel in Eugene and stay there until the next morning. Rather than follow those instructions, Bostain drove the truck home and parked it near his house.

After his termination, Bostain did not file a claim for overtime wages with the WDLI. Instead, in December 2002, he filed a complaint with the Clark County Superior Court seeking overtime wages under RCW 49.46.130(1); double wages and attorney fees under RCW 49.52.070 for Food Express's willful failure to pay overtime wages; and a finding that Marc Widing, the Vancouver terminal manager, should be personally liable for the overtime wages under RCW 49.46.010(4) and 49.52.070.

Appendix B

Keeney completed a log audit of Bostain's final year of employment, June 2001 through May 2002, and found that during that year Bostain's driving time within Washington State constituted 37 percent of his total driving time, 63 percent was out of state.

The log audit also showed that Bostain averaged a total of 48 hours of driving/loading per week. Keeney's audit showed that Bostain never worked more than 40 hours in any work week within Washington State.

In January 2003, Food Express filed its answer with affirmative defenses, alleging that when RCW 49.46.130(1) is read in conjunction with WAC 296-128-012, the statute contemplates that for the overtime wages requirements to apply to interstate truck drivers, the drivers must drive more than 40 hours in a week within Washington State. It also alleged the affirmative defense of estoppel.

On February 6, Food Express's counsel wrote a letter to the WDLI requesting its opinion as to whether Food Express was liable to Bostain for overtime wages. Elaine Fischer, an industrial relations specialist for the WDLI, responded that Food Express did not owe Bostain overtime wages because "[t]he department regulates only hours worked within the state of Washington," citing WAC 296-128-012. Clerk's Papers (CP) at 225.

On February 19, Bostain moved for partial summary judgment as to the agreement and related affirmative defenses and out-of-state hours. The trial court granted the motion in part, finding that Food Express owed Bostain overtime wages

because RCW 49.46.130(1) preceded over WAC 296-128-012 "because the former does not speak to the issue of whether the hours worked must be within the State of Washington[.]" CP at 859.

The court also concluded that Bostain's employment was subject to RCW 49.46.130(1) absent an applicable exemption. It held that Food Express failed to prove that an exemption in the WMWA applied. The court found that Fischer's letter was not dispositive because the letter stated that WDLI regulated only hours worked in Washington State instead of stating that WDLI regulated all employees in the state of Washington.

The trial court entered its amended final order and judgment on February 19, 2004. The court entered judgment against Food Express of $9,846.64 for unpaid overtime wages; $3,236.21 prejudgment interest up to September 26, 2003; and $15,000 attorney fees. The court calculated the attorney fees using the lodestar method.

I. Standard of Review

Food Express asks this court to review the trial court's grant of summary judgment. This court reviews a grant of summary judgment de novo, placing itself in the same position as the trial court in reviewing the evidence. *Herron v. Tribune Pub'g Co.*, 108 Wash.2d 162, 169, 736 P.2d 249 (1987). We uphold a grant of summary judgment where "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." CR 56(c). Summary judgment is appropriate only if, from all the

evidence, reasonable persons could reach but one conclusion. *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wash.2d 622, 630, 71 P.3d 644 (2003).

II. WMWA

A. Statutory Interpretation

The first issue raised in this appeal is one of first impression. We must interpret RCW 49.46.130 of the WMWA, chapter 49.46 RCW. We do so employing a de novo standard of review. *Stuckey v. Dep't of Labor & Indus.*, 129 Wash.2d 289, 295, 916 P.2d 399 (1996). And we seek to carry out the statute's legislative intent. *Rozner v. City of Bellevue*, 116 Wash.2d 342, 347, 804 P.2d 24 (1991). If a statute is plain and unambiguous, we derive its meaning from the statutory language. *Dep't of Transp. v. State Employees' Ins. Bd.*, 97 Wash.2d 454, 458, 645 P.2d 1076 (1982).

In *Department of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d 1, 43 P.3d 4 (2002), our Supreme Court directed courts to derive the plain meaning of a statute "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Campbell & Gwinn*, 146 Wash.2d at 11, 43 P.3d 4. Such a formulation, the court noted was "more likely to carry out legislative intent." *Campbell & Gwinn*, 146 Wash.2d at 11-12, 43 P.3d 4.

Under the "plain meaning rule" we look to the ordinary meaning of the statutory language, the underlying legislative purposes, and closely related statutes. By interpreting

statutory provisions, courts can achieve a "harmonious total statutory scheme ... which maintains the integrity of the respective statutes." *In re Estate of Kerr*, 134 Wash.2d 328, 336, 949 P.2d 810 (1998) (citing *State v. Williams*, 94 Wash.2d 531, 547, 617 P.2d 1012 (1980) (quoting *State v. Wright*, 84 Wash.2d 645, 650, 529 P.2d 453 (1974))). We read statutes relating to the same subject as complementary and not in conflict. *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wash.2d 621, 630, 869 P.2d 1034 (1994).

B. RCW 49.46.130

RCW 49.46.130(1) states in part:

> Except as otherwise provided in this section, no employer shall employ any of his employees for a work week longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

The plain meaning here is obvious: an employer must pay overtime compensation to an employee for work performed in excess of 40 hours in a week unless an exemption applies. The purpose of the WMWA is to establish a minimum wage for employees of the state "to encourage employment opportunities within the state." RCW 49.46.005. WAC 296-128-011(1) defines the "[o]vertime rate of pay" as the "amount of compensation paid for hours worked within the state of Washington in excess of forty hours per week."

Appendix B

Using the plain meaning rule, only one legislative intent is possible: the minimum wage act applies only to those hours an employee works within the state. Any other reading results in "unlikely, absurd, or strained consequences," *Thurston County ex rel. Bd. of County Commr's v. City of Olympia*, 151 Wash.2d 171, 175, 86 P.3d 151 (2004) (citing *State v. Fjermestad*, 114 Wash.2d 828, 835, 791 P.2d 897 (1990)), that are inconsistent with the statute's purpose. *State v. Wittenbarger*, 124 Wash.2d 467, 484-85, 880 P.2d 517 (1994). It is apparent from these provisions that overtime compensation only applies to the hours an employee works within the state of Washington.

We give great weight to the Department's interpretation of the statute absent a compelling indication that its interpretation conflicts with the legislative intent. *Wash. Water Power Co. v. Wash. State Human Rights Comm'n*, 91 Wash.2d 62, 68-69, 586 P.2d 1149 (1978). The Department is limited to its legislatively granted powers and authority, *Wash. Water Power Co.*, 91 Wash.2d at 69, 586 P.2d 1149, and in promulgating WAC 296-128-011, it acted within its power. WAC 296-128-011 derives from RCW 49.46.130(2) (f) and defines overtime as not being owed to a truck driver unless the truck driver works more than 40 hours within the state. Thus, since the Department's interpretation of RCW 49.46.130 does not conflict with the legislative intent, we can use WAC 296-128-011 as an aid in determining the legislative intent of RCW 49.46.130.

Both parties rely on *Department of Labor and Industries v. Common Carriers, Inc.*, 111 Wash.2d 586, 762 P.2d 348 (1988). Common Carriers employed a truck mechanic from

January 1, 1983, to July 17, 1984. *Common Carriers*, 111 Wash.2d at 587, 762 P.2d 348. During that time the employee worked solely in Washington in excess of 40 hours per week during 35 pay periods. *Common Carriers*, 111 Wash.2d at 587, 762 P.2d 348. Common Carriers failed to pay the employee any overtime wages. *Common Carriers*, 111 Wash.2d at 587, 762 P.2d 348.

The WDLI brought a derivative overtime wage claim on the employee's behalf. *Common Carriers*, 111 Wash.2d at 587, 762 P.2d 348. Our Supreme Court examined "whether regulation of maximum hours worked in the federal Motor Carrier Act (MCA) (49 U.S.C. § 3101 *et seq.*) preempts the overtime wage provision in the WMWA." *Common Carriers*, 111 Wash.2d at 588, 762 P.2d 348. The court found that Congress had not expressed a clear intent to preempt state overtime wage provisions. *Common Carriers*, 111 Wash.2d at 589, 762 P.2d 348. Thus, the court held that RCW 49.46.130 did not apply. *Common Carriers*, 111 Wash.2d at 590, 762 P.2d 348.

The parties also rely on *Department of Labor and Industries v. Overnite Transportation Company*, 67 Wash.App. 24, 834 P.2d 638 (1992), *review denied*, 120 Wash.2d 1030, 847 P.2d 481 (1993). Overnite was a Virginia corporation registered in Washington to do business as a common carrier. *Overnite*, 67 Wash.App. at 27, 834 P.2d 638. Overnite received goods from both inside the state and outside for distribution. *Overnite*, 67 Wash.App. at 27, 834 P.2d 638. By August 1987, the company's 11 Washington driver employees collectively had worked almost 2000 hours of overtime without receiving overtime compensation as

described in the WMWA. *Overnite*, 67 Wash.App. at 27, 834 P.2d 638. WDLI investigated and discovered that the employees had experienced a collective wage loss of $9,786.91 for overtime work performed *within the state*. *Overnite*, 67 Wash.App. at 27-28, 834 P.2d 638. It requested that Overnite comply with the WMWA but Overnite refused. *Overnite*, 67 Wash.App. at 28, 834 P.2d 638.

WDLI then filed a complaint in the superior court seeking recovery of the lost wages on behalf of the 11 employees. *Overnite*, 67 Wash.App. at 28, 834 P.2d 638. The King County Superior Court granted summary judgment in favor of the WDLI. *Overnite*, 67 Wash.App. at 28, 834 P.2d 638.

In its review, Division One of this court considered three issues: (1) whether the superior court erred when it found that the federal Motor Carrier Act (MCA) preempted the WMWA's application to an interstate motor carrier; (2) whether WMWA's overtime provisions on interstate motor carriers unduly burdened interstate commerce; and (3) whether the WDLI failed to comply with the Administrative Procedures Act when it adopted the rule applying the WMWA to interstate motor carriers. *Overnite*, 67 Wash.App. at 28, 31-32, 834 P.2d 638. The court held that the federal MCA did not preempt the WMWA's overtime provisions following *Common Carriers*. *Overnite*, 67 Wash.App. at 31, 834 P.2d 638. And it noted that working entirely within the state was not a prerequisite for receiving overtime compensation and ruled that the overtime wage provisions did not unduly burden interstate commerce. *Overnite*, 67 Wash.App. at 30, 32, 834 P.2d 638. Finally, the court ruled that the WDLI did not need to adopt and publish

the rule from *Common Carriers* under the Administrative Procedures Act because the Supreme Court's opinion "had the force of law on the date on which it was decided." *Overnite*, 67 Wash.App. at 33, 834 P.2d 638.

Thus, both *Common Carriers* and *Overnite* concerned only hours worked within Washington State. *Overnite* is similar only in that hours worked within the state were considered, even though the drivers "may be and have been called upon to drive interstate." *Overnite*, 67 Wash.App. at 30, 834 P.2d 638. That was the context wherein the court held that those drivers were not disqualified from overtime if they had driven outside the state but had worked more than 40 hours in any week. The claim was only for those hours worked within the state; thus its holding has no bearing here.

Under RCW 49.46.130(1), an employer cannot require an employee to work more than 40 hours a week in state unless the employer compensates the employee at one-and-one-half times the employee's regular rate. That situation did not exist here and thus, the trial court erred in granting partial summary judgment.

C. RCW 49.46.130(2)(f)

Bostain argues that Food Express failed to prove it met the "*reasonably equivalent*" exception found in RCW 49.46.130(2)(f). Br. of Resp't at 5. But Food Express argues that the "reasonably equivalent" exception is not triggered until a driver works more than 40 hours a week in Washington State. Reply Br. of Appellant at 2. Food Express is correct.

Neither this provision nor the WAC that implements it are relevant to this case. RCW 49.46.130(2)(f) provides an exemption from RCW 49.46.130(1) for employers in the following circumstance:

> An individual employed as a truck or bus driver who is subject to the provisions of the Federal Motor Carrier Act (49 U.S.C. Sec. 3101 et seq. and 49 U.S.C. Sec. 10101 et seq.), if the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to that required by this subsection, for working longer than forty hours per week.

WAC 296-128-012 relates to the exception discussed in RCW 49.46.130(2)(f), which is not at issue in this case. WAC 296-128-012 states in part:

> The compensation system under which a truck or bus driver subject to the provisions of the Federal Motor Carrier Act is paid shall include overtime pay at least reasonably equivalent to that required by RCW 49.46.130 ***for working within the state of Washington in excess of forty hours a week.*** To meet this requirement, an employer may, with notice to a truck or bus driver subject to the provisions of the Federal Motor Carrier Act, establish a rate of pay that *is not on an hourly basis* and that includes in the rate of pay compensation for overtime.

WAC 296-128-012(1)(a) (emphasis added).

But this provision is not at issue here because Bostain did not work within Washington State more than 40 hours a week, and he was paid on an hourly basis.

Food Express also places great importance on the letter it received from Elaine Fischer at WDLI. That letter, however, is not a formal administrative decision. Although a court will sometime give deference to an agency's interpretation, "the court is the final authority on statutory construction and it need not approve regulations or decisions inconsistent with a statute." *Moses v. Dep't of Soc. & Health Servs.*, 90 Wash.2d 271, 274, 581 P.2d 152 (1978). Fischer's understanding of WDLI's intent is not a formal administrative decision and thus, not subject to deference. *City of Sunnyside v. Fernandez*, 59 Wash.App. 578, 581, 799 P.2d 753 (1990).

III. Attorney Fees on Appeal

Food Express requests attorney fees on appeal under RCW 4.84.010. Because Food Express is the substantially prevailing party in this appeal, we award fees and costs to Food Express.

To summarize: Bostain was not entitled to overtime wages under the statute. Because Bostain is not entitled to overtime wages, he is not entitled to prejudgment interest or attorney fees. As such, we do not discuss his cross-appeal claims regarding prejudgment interest or attorney fees.

Reversed.

I concur: QUINN-BRINTNALL, C.J.

MORGAN, J. (concurring).

A statute is ambiguous if it has two or more reasonable meanings.[2] The statute in issue here, RCW 49.46.130, reasonably might apply to all hours worked, or only to all hours worked within the state. As a consequence, it is ambiguous.

To resolve the ambiguity, I would look to the intent of the legislature.[3] I would also look to the Department's interpretation as manifested in WAC 296-128-011.[4] Both indicate that RCW 49.46.130 applies only to hours worked within the state. Hence, I concur in the result.

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2. *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wash.2d 226, 242-43, 88 P.3d 375 (2004).

3. *Murphy*, 151 Wash.2d at 242, 88 P.3d 375.

4. *City of Pasco v. Pub. Employment Relations Comm'n*, 119 Wash.2d 504, 507, 833 P.2d 381 (1992).

APPENDIX C — AMENDED FINAL ORDER AND JUDGMENT OF THE SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY DATED AND FILED FEBRUARY 19, 2004

SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

NO: 02-2-05218-9

LARIE E. BOSTAIN and LAURIE JO BOSTAIN, husband and wife,

Plaintiffs,

vs.

FOOD EXPRESS, INC., an unregistered corporation, and MARC WIDING, a single man,

Defendants.

AMENDED FINAL ORDER AND JUDGMENT

JUDGMENT SUMMARY

A. Judgment creditors: Larie E. Bostain and Laurie Jo Bostain

B. Judgment debtor: Food Express, Inc.

C. Principal judgment amount: $9,846.64

D. Interest to September 26, 2003: $3,236.21

Appendix C

E. Attorney fees: $15,000.00

F. Costs: $375.71

G. Other recovery amount: none

H. Principal judgment shall bear interest at 12% per annum.

I. Attorney fees, costs and other recovery amounts shall bear interest at 12% per annum.

J. Attorney for judgment creditor: James F Gray

K. Attorney for judgment debtor: Hal Schofield

L. Other: none

The following documents were called to the attention of the Court as part of Plaintiffs' two motions for summary judgment and motion for attorney fees:

as to the first motion for summary judgment: Complaint, Answer, Plaintiffs' Motion for Partial Summary Judgment re Agreement and Related Affirmative Defenses and Out-of-State Hours, Plaintiffs' Opening Memorandum Pursuant to Motion for Partial Summary Judgment re Agreement and Related Affirmative Defenses and Out-of-State Hours, Plaintiff Larie E. Bostain's Declaration Pursuant to Plaintiffs' Motion for Partial Summary Judgment as to Out-of-State Hours, Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Correction to Memorandum in Opposition to Plaintiff's Motion for Partial Summary

Appendix C

Judgment, Affidavit of Walter L. Keeney in Support of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment, Affidavit of Counsel in Support of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment, Plaintiffs' Reply Memorandum Pursuant to Motion for Partial Summary Judgment re Agreement and Related Affirmative Defenses and Out-of-State Hours, Plaintiff Larie E. Bostain's Second Declaration Pursuant to Motion for Partial Summary Judgment as to Out-of-State Hours, Declaration of Attorney for Plaintiffs Pursuant to Plaintiffs' Motion for Partial Summary Judgment as to Out-of-State Hours, Findings of Fact and Conclusions of Law and Order on Plaintiffs' Motion for Partial Summary Judgment re Agreement and Related Affirmative Defenses and Out-of-State Hours,

as to the second motion for summary judgment: Plaintiffs' Second Motion for Summary Judgment, Plaintiffs' Opening Memorandum Pursuant to Plaintiffs' Second Motion for Summary Judgment, Declaration of Plaintiff Larie E. Bostain re Log Books Pursuant to Plaintiffs' Second Motion for Summary Judgment, Declaration of Attorney for Plaintiffs Pursuant to Plaintiffs' Second Motion for Summary Judgment, Declaration of Alicia Bostain re Spreadsheet, Memorandum in Opposition to Plaintiff's Second Motion for Partial Summary Judgment, Affidavit of Counsel in Support of Defendants' Opposition to Plaintiffs' Second Motion for Partial Summary Judgment, Plaintiffs' Reply Memorandum Pursuant to Plaintiffs' Second Motion for Summary Judgment.

Appendix C

as to the motion for attorney fees: Plaintiffs' Motion for Attorney Fees and Other Costs, Declaration of Attorney for Plaintiffs re Attorney Fees and Other Costs, Plaintiffs' Memorandum re Attorney Fees and Other Costs, Declaration of Peter Fels re Attorney Fees, Declaration of David Snyder re Attorney Fees, Memorandum in Opposition to Plaintiff's Motion for Attorney Fees.

THIS MATTER having come on regularly before this Court for hearing on Plaintiffs' Second Motion for Partial Summary Judgment, and the Court having heard arguments of counsel, and having considered the records and files herein, and being fully advised in the premises, now, therefore,

THE COURT MAKES THE FOLLOWING FINDINGS OF FACT:

1. The Court's Findings of Fact and Conclusions of Law and Order on Plaintiffs' Motion for Partial Summary Judgment re Agreement and Related Affirmative Defenses and Out-of-State Hours dated June 27, 2003 are incorporated here by reference as though fully set out. As to the Findings of Fact contained therein, the Court finds there is no issue of material fact.

2. The Court finds there is no issue of material fact as to the amount Plaintiff Larie E. Bostain is owed in unpaid overtime. The amount of Plaintiff Larie E. Bostain's unpaid overtime is determined to be $9,846.64, as listed in the spreadsheet which is attached hereto as Exhibit A.

3. The Court finds there is no issue of material fact as to whether the sum listed in paragraph 2 of the Findings of Fact is liquidated; the Court finds that it is.

4. The Court finds there is no issue of material fact as to the statutory interest owed. Statutory interest to September 26, 2003 on the unpaid overtime is determined to be $3,236.21.

5. The Court finds that Plaintiffs' attorney, James F. Gray, has been an attorney for 19 years and has practiced employment law for 18 years and that employment law is his largest area of practice. Mr. Gray asks for an hourly rate of $135.00 and the Court finds this amount is reasonable for an attorney of Mr. Gray's experience in the Clark County area. Mr. Gray also asks for a multiplier of 1.5. The Court finds that the lodestar amount in this case is 170.2 hours; this would lead to a total of $22,977.00 in attorney fees. However, the Court also finds that, due to the following factors, attorney fees should be reduced below the lodestar amount. These factors are as follows: (1) the determination by this Court that there was a bona fide dispute as set forth in Conclusions of Law No. 3, (2) the fact that the issues presented in the case at bar are unsettled and are a matter of first impression for the appellate courts of the State of Washington, and (3) the size of the award for overtime wages. Accordingly, this Court finds that an award of $15,000 in attorney fees is fair and reasonable. The Court also denies Mr. Gray's request for a multiplier for the same three reasons. Mr. Gray also asks for costs of $375.71 and the Court finds that this amount is reasonable.

Appendix C

THE COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:

1. The Court's Findings of Fact and Conclusions of Law and Order on Plaintiffs' Motion for Partial Summary Judgment re Agreement and Related Affirmative Defenses and Out-of-State Hours dated June 27, 2003 are incorporated here by reference as though fully set out.

2. Defendants' affirmative defenses of estoppel and laches are stricken.

3. Plaintiffs' request for double damages for wilful withholding against Food Express, Inc. pursuant to RCW 49.52.070 is denied because the Court determines that there was a bona fide dispute based on the fact that the law on the issue of out-of-state hours is unsettled and the letter from Hal Schofield to the Department of Labor and Industries dated Feb. 6, 2003, a copy of which is attached hereto as Exhibit B, and the letter from Elaine Fischer of the Department of Labor and Industries to Hal Schofield dated February 26, 2003, a copy of which is attached hereto as Exhibit C.

4. Plaintiffs are granted judgment against Food Express, Inc. for unpaid overtime in the amount of $9,846.64.

5. Pursuant to RCW 19.52.010(1), Plaintiffs are granted statutory interest on the sum listed in paragraph 4 in the amount of $3,236.21 to September 26, 2003.

6. Marc Widing is dismissed as a party with prejudice pursuant to the stipulation of the parties.

7. Plaintiffs are granted attorney fees pursuant to RCW 49.46.090(1) and 49.48.030. The Court has determined, based on its reasoning as set forth in Finding of Fact No. 5, that an award of $15,000.00 is fair and reasonable. Costs shall be awarded in the amount of $375.71.

8. Since this Final Order and Judgment provides judgment as to all claims and all parties, this case is ready for immediate appeal pursuant to Civil Rule 54(a)(1) and (b).

DONE IN OPEN COURT this 19th day of February, 2004.

/s/ EDWIN L. POYFAIR
JUDGE

[Spread Sheet intentionally omitted]

APPENDIX D — ORDER OF THE SUPREME COURT OF WASHINGTON DENYING MOTION FOR RECONSIDERATION FILED JUNE 20, 2007

THE SUPREME COURT OF WASHINGTON

NO. 77201-1

LARIE E. BOSTAIN and LAURIE JO BOSTAIN, husband and wife,

Petitioners,

v.

FOOD EXPRESS, INC., an unregistered corporation; and MARK WIDING, a single man,

Respondents.

ORDER DENYING MOTION FOR RECONSIDERATION

The Court having considered the Respondent's Motion for Reconsideration and Petitioner's Answer to Respondent's Motion for Reconsideration;

Now, therefore, it is hereby

ORDERED:

That Respondent's Motion for Reconsideration is denied.

Appendix D

DATED at Olympia, Washington this 20th day of June, 2007.

For the Court

s/ Gerry L. Alexander
CHIEF JUSTICE

69

FILED
OCT 3 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 07-402

In the Supreme Court of the United States

FOOD EXPRESS, INC.,

Petitioner,

v.

LARIE E. BOSTAIN ET UX.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

BRIEF OF THE AMERICAN TRUCKING ASSOCIATIONS, INC. AND THE WASHINGTON TRUCKING ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

BACKGROUND 2

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. Review Is Necessary Because The Decision Below Conflicts With The MCA And This Court's Decision In *Southland Gasoline* 8

II. Review Is Necessary Because The Decision Below Endorses An Extraterritorial Regulation Of Commerce In Conflict With The Decisions Of This Court And The Federal Circuits. 16

III. Review Is Necessary Because The Decision Below Departs From This Court's Precedents Holding That Slight And Dubious Local Benefits Cannot Justify Substantial, Disruptive Burdens On Interstate Commerce And Vital Interstate Industries. 20

IV. Review Is Necessary Because The Court Below Assumed The Prerogative Of Overruling This Court's Decision In *Morales* And Interpreted The WMWA In A Manner That Conflicts With The FAAAA. 23

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

CASES

Abdu-Brisson v. *Delta Airlines, Inc.*,
128 F.3d 77 (2d Cir. 1997) 19
ACLU v. *Johnson*, 194 F.3d 1149 (10th Cir. 1999) 14
Agsalud v. *Pony Express Courier Corp.*,
833 F.2d 809 (9th Cir. 1987)..... .....8, 9, 18
Am. Booksellers Found. v. *Dean*,
342 F.3d 96 (2d Cir. 2003)..... 14
Ark. Elec. Coop. Corp. v. *Ark. Pub. Serv. Comm'n*,
461 U.S. 375 (1983) 11
Baldwin v. *G. A. F. Seelig, Inc.*,
294 U.S. 511 (1935) 12, 13, 14
Boynton v. *Virginia*, 364 U.S. 454 (1960)..... 11
Brown-Forman Distillers Corp. v.
N.Y. State Liquor Auth., 476 U.S. 573 (1986)..... 12, 13, 14
Californians for Safe & Competitive Dump Truck
Transportation v. *Mendonca*,
152 F.3d 1184 (9th Cir. 1998)..... 19
Capital Cities Cable, Inc. v. *Crisp*, 464 U.S. 813 (1983) 12
Capital Cities Cable, Inc. v. *Crisp*,
467 U.S. 691 (1984) 11, 12
Carolina Trucks & Equip., Inc. v. *Volvo*
Trucks of N. Am., Inc., 492 F.3d 484
(4th Cir. 2007)..... 14
Cent. Delivery Serv. v. *Burch*, 355 F. Supp. 954
(D. Md.), aff'd mem., 486 F.2d 1399 (4th Cir. 1973).... 8, 9
Coil v. *Jack Tanner Co.*, 242 F. Supp. 2d 555
(S.D. Ill. 2002)..... 8
Cotto Waxo Co. v. *Williams*, 46 F.3d 790
(8th Cir. 1995)..... 14
Dean Foods Co. v. *Brancel*, 187 F.3d 609
(7th Cir. 1999)..... 14
Dep't of Labor & Indus. v. *Common Carriers, Inc.*,
762 P.2d 348 (Wash. 1988)..... 8, 9
Edgar v. *Mite Corp.*, 457 U.S. 624 (1982)..... 14

TABLE OF AUTHORITIES—continued

Page(s)

Fry v. *United States*, 421 U.S. 542 (1975) 11
Healy v. *The Beer Inst.*, 491 U.S. 324 (1989) 5, 12, 13, 14
Hines v. *Davidowitz*, 312 U.S. 52 (1941) 8
In re Jet Blue Airways Privacy Litig.,
379 F. Supp. 2d 299 (S.D.N.Y. 2005) 20
Kassel v. *Consol. Freightways Corp.*,
450 U.S. 662 (1981) 17
Leonard v. *Nw. Airlines, Inc.*, 605 N.W.2d 425
(Minn. App. 2000) 20
Levinson v. *Spector Motor Serv.*,
330 U.S. 649 (1947) 7, 9, 10
Morales v. *Trans World Airlines*,
504 U.S. 374 (1992) 6, 17, 18, 19, 20
NCAA v. *Miller*, 10 F.3d 633 (9th Cir. 1993) 14
Pettis Moving Co. v. *Roberts*,
784 F.2d 439 (2d Cir.1986) 8, 9
Pierce County, Wash. v. *Guillen*, 537 U.S. 129 (2003) 4
Pike v. *Bruce Church, Inc.*,
397 U.S. 137 (1970) 5, 12, 14, 17
Pub. Citizen v. *FMCSA*, 374 F.3d 1209
(D.C. Cir. 2004) 6, 7
Raymond Motor Transp., Inc. v. *Rice*,
434 U.S. 429 (1978) 17
Rodriguez de Quijas v. *Shearson/Am. Express*,
490 U.S. 477 (1989) 6, 19
Rowe v. *N.H. Motor Transp. Ass'n*,
448 F.3d 66 (1st Cir. 2006),
cert. granted, 127 S. Ct. 3037 (2007) 6, 17, 18, 19
S. Pac. Co. v. *Arizona*, 325 U.S. 761 (1945) 17
Southland Gasoline Co. v. *Bayley*,
319 U.S. 44 (1943) ..... *passim*
Strain v. *West Travel, Inc.*,
70 P.3d 158 (Wash. App. 2003),
rev. denied, 82 P.3d 243 (Wash. 2004) 9

TABLE OF AUTHORITIES—continued

Page(s)

Thompson v. *Shaw's Supermarkets, Inc.*,
847 A.2d 406 (Me. 2004) 9
TIG Ins. Co. v. *Deaton, Inc.*,
166 F.3d 334 (4th Cir. 1998) 3
United Airlines, Inc. v. *Mesa Airlines, Inc.*,
219 F.3d 605 (7th Cir.2000) 19
Williams v. *W.M.A. Transit Co.*,
472 F.2d 1258 (D.C. Cir. 1972) 8, 9
Wine & Spirits Retailers, Inc. v. *Rhode Island*,
481 F.3d 1 (1st Cir. 2007) 14

STATUTES, RULES AND REGULATIONS

29 U.S.C. § 213(b)(1) 1, 7
46 U.S.C. § 8104 9
49 U.S.C. § 113 7
49 U.S.C. § 14501(c) 6, 17, 18
49 U.S.C. § 31502(b) 7
49 C.F.R. § 395.3 7
Ark. Code § 11-4-211(e) 11
820 Ill. Comp. Stat. § 105/3(d)(7) 11
Ind. Code § 22-2-2-3 11
Ky. Rev. Stat. § 337.285 11
Mo. Rev. Stat. § 290.505.3 11
Mont. Code § 39-3-406(2)(a) 11
Nev. Rev. Stat. § 608.018.3(f) 11
N.C. Gen. Stat. § 95-25.14(c)(1) 11
Or. Admin. Reg. § 839-20-0125(3) 11
43 Pa. Stat. Ann. § 333.105(b)(7) 11
R.I. Gen. Laws § 28-12-4.3(a)(7) 11
W. Va. Code § 21-5C-1(f)(17) 11

MISCELLANEOUS

ATA White Paper, *When Trucks Stop, America Stops*,
July 14, 2006, *at* http://tinyurl.com/3yr43o 4

TABLE OF AUTHORITIES—continued

Page(s)

BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE (1999) 14
Lindsay Traylor Braunig, Note, *Statutory Interpretation in a Choice of Law Context*, 80 N.Y.U. L. REV. 1050 (2005) 15
Food Express, Inc., http://www.foodexp.com/index.html 2
Hours of Service of Drivers, 70 Fed. Reg. 49,978 (Aug. 25, 2005) 2, 7
H.R. CONF. REP. NO. 103-677 (1994), reprinted in 1994 U.S.C.C.A.N. at 1715 ..... 1, 17, 18
Michael Killeen, Davis Wright Tremaine Advisory Bulletin, *Washington's Supreme Court Says State Wage/Hour Law Applies to Work Performed Outside of Washington State, at* http://www. dwt.com/practc/empservices/bulletins/03-07_WageHourLaw.htm 16
JOHN MCPHEE, UNCOMMON CARRIERS (2006) 3
Note, *Safety and Overtime Pay: The Motor Carrier Exemption from the FLSA*, 57 YALE L.J. 1129 (1948) 8
LAWRENCE J. OUELLET, PEDAL TO THE METAL: THE WORK LIVES OF TRUCKERS (Temple Univ. Press 1994) 3
U.S. Census Bureau, 2002 Economic Census, 2002 Commodity Flow Survey (Dec. 2004), *available at* http://www.census.gov/prod/ec02/ec02tcf-us.pdf 16
U.S. Dep't of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook, Truck Drivers and Driver/Sales Workers, *available at* http://www.bls.gov/oco/ocos246.htm 3
PHILLIP WILSON, DRIVER: SIX WEEKS IN AN EIGHTEEN-WHEELER (2005) 4

BRIEF OF THE AMERICAN TRUCKING ASSOCIATIONS, INC. AND THE WASHINGTON TRUCKING ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICI CURIAE*[1]

The American Trucking Associations, Inc. ("ATA") is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Directly and through its affiliated organizations, ATA represents over 30,000 companies and every type and class of motor carrier operation in the United States, including tens of thousands of for-hire carriers, private carriers, leasing companies, and trucking suppliers.

The Washington Trucking Associations ("WTA") is a non-profit corporation established in 1922 by a group of truck owners for the purpose of protecting and promoting the interests of the State's trucking industry. Its members include common carriers, private carriers, dump truckers, log truckers, movers, and suppliers. The WTA serves its members by promoting safe, efficient, and cost-effective business practices, encouraging pro-competitive legislation, improving highway safety through education and legislation, and supporting technologies and innovations that enhance operations, safety, and the environment.

Amici regularly advocate on behalf of the trucking industry in this Court and other courts. *Amici* and their members have a strong interest in motor carrier regulation generally, and ATA has special familiarity with the Federal Aviation

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

Administration Authorization Act ("FAAAA") preemption issue in this case because it actively participated in the formulation of federal motor carrier deregulation policy in Congress. H.R. CONF. REP. NO. 103-677, at 88 (1994), reprinted in 1994 U.S.C.C.A.N. at 1760. *Amici* also have a strong interest in preserving the uniformity of wage and hour regulation of interstate truck drivers that is an important objective of the 1935 Motor Carrier Act ("MCA") and the motor carrier exemption to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 213(b)(1). Finally, *amici* desire to represent the interests of their members that are directly affected by the decision below and bring to the Court's attention concerns that the petition implicates but does not address directly.

BACKGROUND

Petitioner Food Express, Inc., "a California corporation, headquartered in Arcadia, California," "hauls food products between points in several western states." Pet App. 2a; see Food Express, Inc., http://www.foodexp.com/index.html and links therefrom (Food Express operates in eleven Western States and British Columbia and has terminals in California, Washington, and Utah and "equipment stationed in locations from [Arizona to Washington to Montana to Utah]"). Consistent with Food Express's interstate operations, Respondent Larie E. Bostain spent approximately sixty-three percent of his driving time in States other than Washington. Pet App. 3a. Food Express fired Bostain in 2002 after he disobeyed orders to spend the night in Oregon because he had exceeded his permissible driving time under federal law. *Id.* 3a & n.1.

Bostain's travels are typical of interstate truck drivers. In fact, many drivers cover many more States and spend far more time driving outside of their home State than Bostain. For example, the Federal Motor Carrier Safety Administration ("FMCSA") described the schedules of typical "random service" drivers as follows:

> [The] company's trucks do not follow any fixed pattern. Following restarts at home, drivers pick up outbound loads near their home terminal and begin a road tour. Thereafter, the company's sales force does its best to find loads for the random drivers and keep them moving profitably until they complete their road tours and come home. Most road tours will last from one to three weeks.

Hours of Service of Drivers, 70 Fed. Reg. 49,978, 50,047 (Aug. 25, 2005); see also *ibid.* (describing "the working environment of the over-the-road driver" as "quite different from" "'normal' employment").

The Bureau of Labor Statistics similarly notes that "[m]any routes are from city to city and cover long distances. Some companies use two drivers on very long runs—one drives while the other sleeps in a berth behind the cab. These 'sleeper' runs can last for days, or even weeks." U.S. Dep't of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook, Truck Drivers and Driver/Sales Workers, *available at* http://www.bls.gov/oco/ocos246.htm.

The description of an interstate truck driver's travels in a Fourth Circuit opinion is also informative:

> Coffman made his first trip as an interstate truck driver for Deaton on March 3, 1992 * * *. During [the next] two weeks, he made seven trips, which included pickups and deliveries in six different states * * *. He was on the road continuously [during that time], and never returned to [his home] terminal [in North Carolina]. Coffman parked his tractor in North Carolina only once—when he stopped at his home overnight while traveling from Maryland to Georgia. The load Coffman was carrying at the time of his injury was picked up by him * * * in Birmingham, Alabama, and delivered to Charlotte, North Carolina.

TIG Ins. Co. v. *Deaton, Inc.*, 166 F.3d 334 (table), 1998 WL 886890, at *1 (4th Cir. 1998); see also JOHN MCPHEE, UNCOMMON CARRIERS 238-39 (2006) (describing a driver's travels to 46 States and 3 Canadian provinces, including, *inter alia*, hauls from Pennsylvania to Utah, Georgia to California, and Louisiana to Saskatchewan).

Indeed, one driver-turned-sociologist described the "ideal driver" as one who "operates over the road." LAWRENCE J. OUELLET, PEDAL TO THE METAL: THE WORK LIVES OF TRUCKERS 140 (Temple Univ. Press 1994). "[T]hat is, his hauls are not restricted to a single city or urban area; ideally he hauls for distances that take days to cover. He travels to a variety of destinations and encounters all sorts of terrain, weather, and driving conditions." *Ibid.* (footnote omitted).

Thus, depending on the destinations of the loads he picks up, a driver may travel across several States or even cross-country before returning home days or weeks later. And because loads typically become available on short notice, interstate trucking truly is "a business requiring fluctuating hours of employment" (*Southland Gasoline Co.* v. *Bayley*, 319 U.S. 44, 48 (1943)) with extended stretches of time on the road followed by long off-duty periods. This highly unstructured job does not fit neatly into an eight-hour day or forty-hour work week. Within the safety-focused limits established by the federal Hours-of-Service rules, drivers must remain available to work the irregular hours necessary to get the job done, and carriers must retain the flexibility to utilize their drivers efficiently in order to distribute food, fuel, retail products, medical supplies, components, raw materials, and other commodities throughout the country. See ATA White Paper, *When Trucks Stop, America Stops*, July 14, 2006, *at* http://tinyurl.com/3yr43o (describing the interstate trucking industry's role in the distribution various commodities).

The decision below must be assessed in this context: The fact that a driver is technically "based" in a particular State does not mean that he spends most or even much of his

driving time there, as drivers regularly are away from their home State for days or weeks at a time. Rather, as a practical matter, interstate truck drivers are based in the federally regulated channels of interstate commerce, not the terminal to which they return at the conclusion of their runs. Cf. *Pierce County, Wash.* v. *Guillen*, 537 U.S. 129, 146-47 (2003) ("It is well established that the Commerce Clause gives Congress authority to regulate the use of the channels of interstate commerce," including providing for "greater safety on our Nation's roads.") (internal quotation marks omitted); PHILLIP WILSON, DRIVER: SIX WEEKS IN AN EIGHTEEN-WHEELER 369 (2005) (In the course of "travel[ing] this indescribable continent" as an interstate truck driver, "I will go northern border to southern border and sea to shining sea and along both sides of all the Great Lakes and into Canada many times. * * * Where I am and what day it is just won't matter.").

SUMMARY OF ARGUMENT

Since the enactment of the MCA in 1935, the federal government has regulated the hours of service of interstate truck drivers. When it enacted the FLSA just three years later, Congress made the further determination that the federal Hours-of-Service rules ("HOS rules") promulgated under the MCA should be the ***only*** rules governing the hours of interstate truck drivers. The FLSA therefore exempts such drivers from its overtime pay requirements so that, "in a business requiring fluctuating hours of employment," operators and regulators may establish driving schedules and limitations thereon "***without the burden of additional pay for overtime***." *Southland Gasoline*, 319 U.S. at 48 (emphasis added). The exemption is also intended "to free operators of motor vehicles from the regulation by two agencies of the hours of drivers." *Id.* at 48-49.

Despite this longstanding federal policy that the hours of interstate truck drivers should not be burdened by overtime pay or subject to regulation by two federal agencies, the court below held, in a 5-4 decision, that individual ***States*** may im-

pose the same burden and that ***fifty different state agencies*** may regulate the same issue. That decision is wrong and warrants review by this Court for four reasons:

First, it conflicts with the MCA and this Court's decision in *Southland Gasoline*.

Second, by holding that the Washington Minimum Wage Act ("WMWA") applies to hours worked in other States, the Washington Supreme Court transformed the WMWA into an extraterritorial regulation of commerce that is per se invalid under the Commerce Clause and, among other precedents, *Healy* v. *The Beer Inst.*, 491 U.S. 324 (1989). In applying the lenient *Pike* balancing test to this extraterritorial regulation, the court below defied uniform federal precedent holding that such regulations are per se unconstitutional.

Third, the reasoning of the decision below would subject motor carriers to the overtime laws of every State through which their drivers pass. Because, as discussed in Part I, *infra*, drivers often travel through several States in the course of any given week, such a rule would require motor carriers to perform recurring, nightmarish choice-of-law analyses just to pay their drivers and would thereby constitute an impermissible burden on interstate commerce.

Fourth, as interpreted by the court below, the WMWA's overtime requirement has "the force and effect of [a] law related to a price, route, or service of [a] motor carrier." 49 U.S.C. § 14501(c)(1). Such laws are preempted by the FAAAA. See *Morales* v. *Trans World Airlines*, 504 U.S. 374 (1992); *Rowe* v. *N.H. Motor Transp. Ass'n*, 448 F.3d 66, 75 (1st Cir. 2006), cert. granted, 127 S. Ct. 3037 (2007) (No. 06-457). Citing a Ninth Circuit decision and various ERISA cases, the court below justified its ruling to the contrary by asserting that this "Court has * * * pulled back" from *Morales*. That holding is in direct conflict with decisions of the First and Seventh Circuits (although it is consistent with decisions of the Second and Ninth Circuits). It also ignores

this Court's directive that lower courts must "follow [precedent] which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/Am. Express*, 490 U.S. 477, 484 (1989).

ARGUMENT

I. Review Is Necessary Because The Decision Below Conflicts With The MCA And This Court's Decision In *Southland Gasoline*.

"For years, federal regulators have limited the hours of service that truckers, as well as other operators of various vehicles in the transportation industry, can work and operate their motorized conveyances." *Pub. Citizen* v. *FMCSA*, 374 F.3d 1209, 1211 (D.C. Cir. 2004). Beginning in 1935, the MCA "vested in the Interstate Commerce Commission ['ICC'] power to establish reasonable requirements with respect to qualifications and maximum hours of service of employees and safety of operation and equipment of common and contract carriers by motor vehicle." *Levinson* v. *Spector Motor Serv.*, 330 U.S. 649, 658 (1947). Today, "[t]he FMCSA, created by statute in 1999, is the agency charged with promulgating HOS rules regulating drivers of commercial motor vehicles." *Pub. Citizen*, 374 F.3d at 1211; see 49 U.S.C. §§ 113 & 31502(b); 49 C.F.R. § 395.3. See generally Hours of Service of Drivers, *supra*, 70 Fed. Reg. at 49,979-80 (history of the HOS rules).

When Congress enacted the FLSA in 1938, it determined that interstate truck drivers' hours of service should be regulated by the HOS rules ***only*** and that the overtime pay provisions of the FLSA—and the Department of Labor regulations promulgated thereunder—should ***not*** apply to drivers. See generally *Southland Gasoline*, 319 U.S. 44. The FLSA therefore provides that its overtime pay provisions "shall not apply with respect to * * * any employee with respect to whom the [FMCSA] has power to establish qualifications and maximum hours of service." 29 U.S.C. § 213(b)(1).

As this Court has explained, "[b]y exempting * * * drivers * * * from the maximum hour limitations of the [FLSA], Congress evidently relied upon the [HOS rules] to work out satisfactory adjustments for employees charged with the safety of operations in a business requiring fluctuating hours of employment, ***without the burden of additional pay for overtime***." *Southland Gasoline*, 319 U.S. at 48 (emphasis added). A further purpose of the exemption is "to free operators of motor vehicles from the regulation by two agencies of the hours of drivers." *Ibid.*

Southland Gasoline's description of the purpose of the motor carrier exemption is consistent with its legislative history. Then-Senator Black—the FLSA's co-sponsor and later a member of the *Southland Gasoline* Court—explained that truck drivers were exempted because "it was the policy of the committee * * * to write the bill in such a way as not to ***conflict*** with [their] regulation" "by the [ICC]." Note, *Safety and Overtime Pay: The Motor Carrier Exemption from the FLSA*, 57 YALE L.J. 1129, 1133 n.19 (1948) (quoting 81 Cong. Rec. 7875 (1937)) (emphasis added). Senator Black continued: 'The committee were of the opinion * * * that it was exceedingly important that the long hours of truck drivers should be regulated in the interest of public safety." *Ibid.* (quoting same) (ellipsis by the Note; emphasis by the Note omitted).

Plainly, "additional pay for overtime" required by state law is no less a "burden" than federal overtime. Likewise, it would make no sense for Congress to "free" motor carriers from "regulation by two agencies" at the federal level only to subject them to the whims of fifty different state regulators. Thus, because the motor carrier exemption reflects a congressional judgment that overtime pay and dual regulation would affirmatively ***conflict*** with the purposes and objectives of the MCA and the federal HOS rules, application of the WMWA to interstate truck drivers is preempted. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941) (state law is preempted if

it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

In the 1970s and 1980s, however, three federal circuits held that the MCA does not preempt state overtime laws.[2] The analyses of the Second and Ninth Circuits run less than a page each; the D.C. Circuit—the first court to address the issue—devoted about two pages. Each of these opinions relied, directly or indirectly, on this Court's statement in *Levinson* that "[t]here is no necessary inconsistency between enforcing rigid maximum hours of service for safety purposes and at the same time, within those limitations, requiring compliance with the increased rates of pay for overtime work done." *Williams*, 472 F.2d at 1264 (quoting *Levinson*, 330 U.S. at 661); see *Pettis Moving Co.*, 784 F.2d at 441 (same);

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[2] *Agsalud* v. *Pony Express Courier Corp.*, 833 F.2d 809 (9th Cir. 1987); *Pettis Moving Co.* v. *Roberts*, 784 F.2d 439 (2d Cir.1986); *Williams* v. *W.M.A. Transit Co.*, 472 F.2d 1258 (D.C. Cir. 1972); accord *Cent. Delivery Serv.* v. *Burch*, 355 F. Supp. 954 (D. Md.), aff'd mem., 486 F.2d 1399 (4th Cir. 1973); *Dep't of Labor & Indus.* v. *Common Carriers, Inc.*, 762 P.2d 348 (Wash. 1988). But see *Coil* v. *Jack Tanner Co.*, 242 F. Supp. 2d 555, 559 (S.D. Ill. 2002) (holding that the FLSA's exemption for seamen preempted state overtime requirements because Congress "[n]ot only [exempted] seamen from [the] overtime provisions in the FLSA, but also determined a detailed breakdown of the standards governing the hours of seamen") (citing 46 U.S.C. § 8104); *Thompson* v. *Shaw's Supermarkets, Inc.*, 847 A.2d 406, 410 (Me. 2004) (explaining that, for more than thirty years, interstate truck drivers had been exempted from the Maine overtime statute based on the opinions of the state attorney general and department of labor that federal law would preempt the statute's application to them); *Strain* v. *West Travel, Inc.*, 70 P.3d 158, 163 (Wash. App. 2003) (holding that federal maritime law preempts state wage and hour statutes as applied to cruise ship employees because requiring cruise ship operators to "pay each worker according to the laws of the worker's home state" would create "a nightmarish accounting prospect"), rev. denied, 82 P.3d 243 (Wash. 2004).

Agsalud, 833 F.2d at 810 (citing *Williams*, *Pettis Moving Co.*, and *Burch* and holding that Hawaii's overtime pay requirement was not preempted because it did not have "the same effect as a regulation setting a firm maximum on hours worked"); see also *Burch*, 355 F. Supp. at 959 (same as *Williams*); *Common Carriers*, 762 P.2d at 350 (same).

The error of these decisions is their reliance on dicta taken out of context. In context, the passing observation they quote is consistent with the statutory purpose that this Court identified in *Southland Gasoline*. The *Levinson* Court stated:

> The logic of the situation is that Congress, as a primary consideration, has preserved intact the safety program which it and the [ICC] have been developing for motor carriers * * *. To do this, Congress has prohibited the overlapping of the jurisdiction of the * * * Department of Labor, with that of the [ICC] as to maximum hours of service. Congress might have done otherwise. It might have permitted both Acts to apply. There is no necessary inconsistency between enforcing rigid maximum hours of service for safety purposes and at the same time, within those limitations, requiring compliance with the increased rates of pay for overtime work done in excess of the limits set in § 7 of the [FLSA]. Such overlapping, however, has not been authorized by Congress and it remains for us to give full effect to the safety program to which Congress has attached primary importance, even to the corresponding exclusion by Congress of certain employees from the benefits of the compulsory overtime pay provisions of the [FLSA].

330 U.S. at 661-62 (footnote omitted).

The *Levinson* Court thus recognized that the motor carrier exemption reflects a deliberate decision by Congress, "as a primary consideration," to "preserve[] intact" the MCA's

"safety program"—and, crucially, to achieve that objective by "prohibit[ing] the overlapping of the jurisdiction" of overtime regulations and HOS rules. *Ibid.* The Court did observe that, in its own estimation, "Congress ***might*** have done otherwise," but it just as clearly recognized, and gave "full effect to," the approach that Congress ***did*** take. *Ibid.* (emphasis added). *Levinson* is thus entirely consistent with *Southland Gasoline*'s determination that Congress intended "to free operators of motor vehicles from the regulation by two agencies of the hours of drivers" and from "the burden of additional pay for overtime." 319 U.S. at 48.

The lower court decisions denying preemptive effect to the MCA, the federal HOS rules, and the FLSA's motor carrier exemption require correction by this Court. Twenty to thirty-five years after the fact, these courts are unlikely to correct their own mistakes. Moreover, because many other States already exempt interstate truck drivers from their overtime laws,[3] opinions from additional federal circuits or state courts of last resort will likely be few and far between. This case therefore presents an appropriate vehicle for addressing the issue, in conjunction with the issues addressed below.[4]

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[3] See, *e.g.*, Ark. Code § 11-4-211(e); 820 Ill. Comp. Stat. § 105/3(d)(7); Ind. Code § 22-2-2-3; Ky. Rev. Stat. § 337.285; Mo. Rev. Stat. § 290.505.3; Mont. Code § 39-3-406(2)(a); Nev. Rev. Stat. § 608.018.3(f); N.C. Gen. Stat. § 95-25.14(c)(1); Or. Admin. Reg. § 839-20-0125(3); 43 Pa. Stat. Ann. § 333.105(b)(7); R.I. Gen. Laws § 28-12-4.3(a)(7); W. Va. Code § 21-5C-1(f)(17).

[4] We acknowledge that the MCA preemption issue was not raised in the petition or the courts below. Nevertheless, "the relationship between legislative and judicial enforcement of the Commerce Clause is close enough for the pre-emption issue to come, if by the barest of margins, within those subsidiary questions fairly included in the principal question on appeal." *Ark. Elec. Coop. Corp.* v. *Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 382 n.6 (1983) (internal quotation marks and alteration omitted) (addressing preemption issue raised by the Government as *amicus curiae* but not presented

II. Review Is Necessary Because The Decision Below Endorses An Extraterritorial Regulation Of Commerce In Conflict With The Decisions Of This Court And The Federal Circuits.

By extending the WMWA to hours worked outside the State, the court below transformed the statute into a regulation of interstate commerce occurring wholly in other States in conflict with this Court's decisions in *Healy*, *supra*,

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in the appellant's jurisdictional statement); see also, *e.g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697-98 (1984) (reversing based on preemption issue raised by the FCC as *amicus curiae* but not presented in the petition or decided by the courts below); *Fry* v. *United States*, 421 U.S. 542, 545 n.5 (1975) (addressing statutory issue raised by *amici curiae* seeking reversal but not included in the petition or the petitioner's merits brief, which raised only constitutional questions); *Boynton* v. *Virginia*, 364 U.S. 454, 457 (1960) (reversing based on preemption issue not raised in the petition rather than reaching constitutional questions presented, including a dormant Commerce Clause challenge, given that the statutory and constitutional questions were substantively similar). The MCA preemption issue—whether Congress intended to exempt motor carriers from the "burden of additional pay for overtime"—and the *Pike* balancing and FAAAA preemption questions—whether such overtime requirements do impermissibly burden motor carriers—are closely related. Indeed, MCA preemption and unconstitutionality under the dormant Commerce Clause are essentially two sides of the same coin: whether the federal "Power ... To regulate Commerce," through its affirmative exercise or negative implications, preempts the WMWA as it was interpreted and applied below. Given this close relationship, and in order to preserve the option of avoiding difficult constitutional questions, the Court should grant the petition and order briefing and argument on the MCA preemption issue in addition to the questions presented in the petition. See *Capital Cities Cable*, 467 U.S. at 698 (noting that "the parties * * * briefed and argued the [preemption] question pursuant to our order"); *Capital Cities Cable, Inc.* v. *Crisp*, 464 U.S. 813 (1983) (mem. order).

Brown-Forman Distillers Corp. v. *N.Y. State Liquor Auth.*, 476 U.S. 573 (1986), and *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U.S. 511 (1935). In *Healy*, this Court distilled three fundamental constitutional principles from the Court's precedents: "First, the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State[.]" 491 U.S. at 336 (ellipsis and internal quotation marks omitted). Second, if a statute's "practical effect * * * is to control conduct beyond the boundaries of the State," then it "exceeds the inherent limits of the enacting State's authority and is invalid." *Ibid.* "Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how [it] may interact with the [laws] of other States and" the likely impact of similar enactments by other States or every State. *Ibid.* Put simply, the Commerce Clause prohibits "the projection of one state regulatory regime into the jurisdiction of another State." *Id.* at 337.

As interpreted by the court below, the WMWA applies to and "directly controls commerce occurring wholly outside the boundaries of [the] State," namely, wages paid to interstate truck drivers for hours worked in other States. Just as this Court held that Connecticut could not regulate the price of beer in other States (*id.* at 337-38) and that New York could not regulate the price of liquor or milk in other States (*Brown-Forman Distillers*, 476 U.S. at 579-84; *Baldwin*, 294 U.S. at 521), Washington may not regulate the price of labor in other States. Indeed, whereas the statutes that this Court previously struck down regulated out-of-state commerce only indirectly by placing conditions on in-state sales,[5] the deci-

[5] See *Healy* 491 U.S. at 326 (statute required out-of-state beer shippers to affirm that the prices offered to in-state wholesalers were no greater than those offered in neighboring States); *Brown-Forman Distillers*, 476 U.S. at 575 (similar statute governing liquor sales); *Baldwin*, 294 U.S. at 519 (statute provided that "there

sion below interprets the WMWA to ***directly*** regulate the wages paid for out-of-state labor. As noted above, many States have followed the federal lead and exempted interstate truck drivers from their overtime requirements (see *supra* page 11 & note 3), presumably out of deference to the safety-focused federal HOS regulations (or else because they believe that such state regulations would be preempted). By "project[ing]" its legislation into those States and overriding their policies, Washington has "exceed[ed] the inherent limits of [its] authority." *Healy*, 491 U.S. at 336-37. Moreover, if many States or every State did "adopt[] similar legislation," the effect would be a dense and overlapping web of overtime laws of uncertain applicability. *Id.* at 336. Therefore, as applied to hours worked outside of Washington, the WMWA is per se invalid under the Commerce Clause.

That the result below is contrary to this Court's decisions is not surprising given that its reasoning reflects a fundamental misunderstanding and misapplication of those precedents. Specifically, the court below held that "extraterritoriality analysis [is just a] facet[] of the *Pike* [balancing] test" and sought to justify the statute's extraterritorial application based on its purported "local benefits." Pet. App. 20a-21a. Although a majority of this Court has never explicitly stated that state statutes regulating out-of-state commerce are per se unconstitutional, that proposition is implicit in its opinions (see *Healy*, 491 U.S. at 336; *Brown-Forman Distillers*, 476 U.S. at 578-84; *Edgar* v. *Mite Corp.*, 457 U.S. 624, 642-43 (1982) (plurality opinion); *Baldwin*, 294 U.S. at 521-24; BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 6.06[F] (1999)), and every court of appeals that has addressed the issue has so held.[6] The

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shall be no sale within the state of milk bought outside unless the price paid to the producers was" equal to or greater than the minimum price set by the statute).

[6] *E.g.*, *Carolina Trucks & Equip., Inc.* v. *Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 491-92 (4th Cir. 2007); *Wine & Spirits Retail-*

Court should therefore grant the petition to correct this misapplication of its extraterritoriality precedents and to clarify that such statues cannot be justified based on purported "local benefits."

III. Review Is Necessary Because The Decision Below Departs From This Court's Precedents Holding That Slight And Dubious Local Benefits Cannot Justify Substantial, Disruptive Burdens On Interstate Commerce And Vital Interstate Industries.

As discussed in Part I, interstate truck drivers frequently travel to several different States in the course of a single week and, like Bostain, spend a majority of their driving time outside their home State. Subjecting interstate motor carriers to the vagaries of the wage and hour laws of all the various States through which their drivers pass would impose a substantial and unjustifiable burden on their operations.

Indeed, merely determining ***which*** State's law would apply to a particular driver in any given week would be a daunting task fraught with uncertainty.[7] While the court be-

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ers, Inc. v. *Rhode Island*, 481 F.3d 1, 15 (1st Cir. 2007); *Am. Booksellers Found.* v. *Dean*, 342 F.3d 96, 104 (2d Cir. 2003); *Dean Foods Co.* v. *Brancel*, 187 F.3d 609, 616 (7th Cir. 1999); *ACLU* v. *Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999); *Cotto Waxo Co.* v. *Williams*, 46 F.3d 790, 793 (8th Cir. 1995); *NCAA* v. *Miller*, 10 F.3d 633, 640 (9th Cir. 1993).

[7] See Pet. App. 40a (noting the "unenviable task of researching and resolving" choice-of-law issues created by the decision below). As one commentator has explained, many courts determine whether a plaintiff may sue under a state statute by attempting to divine "legislative intent," an approach that is inherently unpredictable because "legislatures rarely give [the choice-of-law issue] any thought," and, "[w]ith a state statute, * * * legislative history is often limited and difficult to obtain." Lindsay Traylor Braunig, Note, *Statutory Interpretation in a Choice of Law Context*, 80 N.Y.U. L. REV. 1050, 1050-52 (2005). The author advocates instead a "common law * * * choice of law analysis" "focus[ing] on

low offered repeated assurances that the WMWA will apply to "Washington-based employees" only,[8] carriers can hardly assume that other States will follow suit (or that Washington law will not be reinterpreted in future cases). For example, if a driver is "based" in Washington but spends three times as much time in California, California would seem to have the more significant relationship to any overtime claim. Or if a driver splits his time relatively equally among six different States, each State would have a plausible basis for applying its statute. Different courts applying varying choice-of-law analyses are likely to reach inconsistent results so that more than one State's law could apply to a single driver. Moreover, for "random service" drivers with irregular routes (see Part I, *supra*), carriers would have to re-evaluate this difficult and uncertain legal issue on an almost weekly basis.

To be sure, employers with multi-state operations inevitably encounter difficult choice-of-law issues from time to time, and not every such problem raises a constitutional question. That is not the issue here. Rather, the decision below imposes a substantial and recurring burden on an interstate

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which state has the most significant relationship with the cause of action, or on which state has the greatest interest in having its law applied." *Id.* at 1052. Given the number of states through which an interstate truck driver may travel in a particular week, however, either approach would create massive uncertainty in this context.

[8] Even these assurances ring hollow given that "[w]hether overtime * * * must be paid for an employee as a Washington-based employee will depend on factors that courts routinely use for deciding choice of laws issues." Pet App. 11a n.5; 41a. The term "Washington-based employee" is not defined by statute or regulation, and the court gave no other guidance on the issue, which suggests that "a series of case-by-case lawsuits" will be necessary to clarify the term. Michael Killeen, Davis Wright Tremaine Advisory Bulletin, *Washington's Supreme Court Says State Wage/Hour Law Applies to Work Performed Outside of Washington State*, *at* http://www.dwt.com/practc/empservices/bulletins/03-07_WageHourLaw.htm.

industry of vital importance to the national economy and the channels of interstate commerce[9] by introducing significant uncertainty into its basic payroll processes on a weekly basis. That burden is "clearly excessive in relation to" the minimal "putative local benefits" of applying the WMWA extraterritorially.[10] *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The Court should grant review to reaffirm that such "slight and dubious" local benefits cannot justify burdens on interstate commerce in general—and the vital freight transport industry in particular—that disrupt "needed [national] uniformity," thereby "increasing * * * cost[s] and impairing * * * efficiency." *S. Pac. Co.* v. *Arizona*, 325 U.S. 761, 779-80 (1945); accord, *e.g.*, *Kassel* v. *Consol. Freightways Corp.*, 450 U.S. 662, 671-79 (1981) (plurality opinion); *Raymond Motor Transp., Inc.* v. *Rice*, 434 U.S. 429, 442-48 (1978).

IV. Review Is Necessary Because The Court Below Assumed The Prerogative Of Overruling This Court's Decision In *Morales* And Interpreted The WMWA In A Manner That Conflicts With The FAAAA.

The FAAAA preempts any "law * * * related to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1). This preemption provision was modeled after the Airline Deregulation Act's preemption provision and was

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[9] As of the 2002 Economic Census, the trucking industry transported nearly eight billion tons of freight (more than two-thirds of all freight shipped in the United States) with a value of more than $6 trillion. U.S. Census Bureau, 2002 Economic Census, 2002 Commodity Flow Survey, tbl.1a (Dec. 2004), *available at* http://www.census.gov/prod/ec02/ec02tcf-us.pdf.

[10] As noted by the dissent below, "the public purpose of the [WMWA] is focused on promoting employment and compensating employees within the state of Washington," interests which are not furthered by, and are "largely unrelated to," its extraterritorial extension. Pet. App. 41a. Indeed, if anything, the decision creates an incentive for interstate employees to employee drivers "based" in other States whenever feasible.

intended to incorporate "the broad preemption interpretation adopted by [this] Court in *Morales*." H.R. CONF. REP. NO. 103-677, *supra*, at 83; see *Rowe*, 448 F.3d at 75. As this Court held in *Morales*, the language Congress selected is "deliberately expansive, and conspicuous for its breadth." 504 U.S. at 384 (internal quotation marks and citation omitted). Accordingly, it preempts any law that makes express "reference to" or has a "forbidden significant effect" on prices, routes, or services. *Id.* at 388 (internal quotation marks omitted).

The purpose of this provision is to free motor carriers from the "patchwork" of state regulations that had developed prior to its enactment. H.R. CONF. REP. NO. 103-677, *supra*, at 87. Congress found that such inconsistent regulation "cause[d] significant inefficiencies" and "increased costs" and that "[t]he sheer diversity of * * * regulatory schemes [was] a huge problem for national and regional carriers attempting to conduct a standard way of doing business." *Ibid.*

As interpreted by the court below, the WMWA has a "forbidden significant effect" on the prices, routes, and services of motor carriers. If interstate motor carriers must pay overtime to drivers, then they will increase their prices and alter their routes and services accordingly. This is not speculation; it is basic economics.[11] Nor is this relationship "too

[11] Indeed, in the course of (erroneously) holding that the MCA does not preempt state overtime requirements as applied to interstate truck drivers, the Ninth Circuit made the case for FAAAA preemption: "One need not be an economist to realize that ***some*** employers ***may*** continue to provide more than 40 hours of work even though an overtime premium is required, because paying the premium ***may*** be cheaper than the alternatives of ***not providing service to customers*** or hiring more help." *Agsalud*, 833 F.2d at 810 (emphases added). Because the FAAAA preempts state laws that "relate[] to ***a*** price, route, or service of ***any*** motor carrier" (49 U.S.C. § 14501(c) (emphasis added); see *Rowe*, 448 F.3d at 72-73), the fact that "some employers" will alter their services (or

tenuous, remote, or peripheral" to be preempted. *Morales*, 504 U.S. at 390. If States require motor carriers to pay overtime not required by federal law, that will have a very ***direct*** impact on their rates: if the driver must be paid more, then the delivery will cost more. And if the market will not bear increased rates, carriers will be forced to reconsider their routes and services. See *id.* at 388 ("it is clear as an economic matter that state restrictions on fare advertising have the forbidden significant effect upon fares"); *Rowe*, 448 F.3d at 81 (holding that the FAAAA preempts a state statute that "has the effect of forcing UPS to change its uniform package-processing procedures"); see also *Morales*, 504 U.S. at 386 (rejecting as "irrational" the argument that the ADA does not preempt "laws of general applicability" such as state consumer protection statutes). Allowing Washington's overtime requirement to stand will also expose motor carriers to precisely the sort of "patchwork" of regulations that the FAAAA was intended to prevent. See Part III, *supra*.

The court below sought to avoid *Morales*'s preemptive effect by asserting that *Morales* is no longer good law, citing a Ninth Circuit decision and various ERISA cases. Pet. App. at 23a n.9 (asserting that this "Court has * * * pulled back from" *Morales* and citing *Californians for Safe & Competitive Dump Truck Transportation* v. *Mendonca*, 152 F.3d 1184 (9th Cir. 1998)). This claim is illogical given that Congress specifically intended the FAAAA to incorporate the preemptive scope articulated in *Morales*; obviously, Congress did ***not*** incorporate ERISA cases that post-date the FAAAA's enactment. The court below thus committed a fundamental error by ignoring "precedent of this Court [that] has direct application" and instead assuming for itself "the prerogative of overruling" that precedent. *Rodriguez de Quijas*, 490 U.S. at 484.

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prices) in response to the WMWA's expansion establishes preemption under the FAAAA.

The Second and Ninth Circuits have also assumed the prerogative of overruling *Morales*. See *Abdu-Brisson* v. *Delta Airlines, Inc.*, 128 F.3d 77, 82-83 (2d Cir. 1997) (ADA preemption); *Mendonca*, 152 F.3d at 1189. In contrast, the First and Seventh Circuits have rejected invitations to do so, holding that *Morales* remains good law—indeed, "the seminal case"—for purposes of FAAAA and ADA preemption. *Rowe*, 448 F.3d at 75-76; *United Airlines, Inc.* v. *Mesa Airlines, Inc.*, 219 F.3d 605, 608 (7th Cir.2000) (Easterbrook, J.) (ADA preemption); see also, *e.g.*, *In re Jet Blue Airways Privacy Litig.*, 379 F. Supp. 2d 299, 314-15 & n.11 (S.D.N.Y. 2005) (noting this disagreement); *Leonard* v. *Nw. Airlines, Inc.*, 605 N.W.2d 425, 430 (Minn. App. 2000) (same). Because the Washington Supreme Court's expansion of the WMWA is preempted under *Morales*, this Court should grant the petition to resolve the growing disagreement in the lower courts concerning *Morales*'s continuing viability.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2007

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(3)

No. 07-402

FILED
OCT 25 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

FOOD EXPRESS, INC.,
Petitioner,

v.

LARIE E. BOSTAIN ET UX.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF GORDON TRUCKING, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

		Page
I.	INTEREST OF AMICUS CURIAE	1
II.	SUMMARY OF ARGUMENT	2
III.	ARGUMENT	7
	A. The Decision Below Conflicts with This Court's Dormant Commerce Clause Precedents Because It Would Result in Substantial Burdens on Interstate Commerce Without Countervailing Local Benefit	7
	1. The Decision Below Would Impose Substantial Burdens on Interstate Commerce	8
	2. The Decision Below Would Not Result in Any Countervailing Local Benefit	13
	B. The Decision Below Conflicts with This Court's Precedent and the FAAAA Because It Would Have a Significant Effect on Prices, Routes or Service of Interstate Trucking Companies	19
IV.	CONCLUSION	22

TABLE OF AUTHORITIES

Page

Cases

Californians for Safe & Competitive Dump Truck Transp. v. Mendonca, 152 F.3d 1184 (9th Cir. 1998) 22

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 19, 20, 21

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) ... 2, 3, 7, 8

Southland Gasoline Co. v. Bayley, 319 U.S. 44 (1943) 19

Strain v. West Travel, Inc., 117 Wn. App. 251, 70 P.3d 158 (2003) 8

Williams v. W.M.A. Transit Co., 472 F.2d 1258 (D.C. Cir. 1972) 8

Statutes

49 U.S.C. § 14501(c) 19

RCW 49.46.0005 ..... 5, 13

RCW 49.46.100(1) 13

RCW 49.46.130(1) 5

RCW 49.52.070 13

Regulations and Rules

Or. Admin. Reg. § 839-20-0125(3) 16

Other Authorities

William Prosser, *Interstate Publication*, 51 MICH. L. REV. 959 (1953) 9

I. INTEREST OF AMICUS CURIAE[1]

Gordon Trucking, Inc. ("GTI") is a third-generation, family-owned interstate truckload transportation company. GTI hauls full truckload freight throughout 48 states and Canada. The company operates eight terminals and thirteen satellite yards in nine states, from Washington to California to Wisconsin. GTI employs approximately 1,775 people, including some 1,094 interstate company truck drivers, and contracts with an additional 150 owner-operators. GTI's headquarters and busiest terminal are located in Pacific, Washington.

In the case below, analyzing the Washington Minimum Wage Act ("WMWA"), the Washington Supreme Court invalidated regulations of the Washington State Department of Labor & Industries interpreting that act and announced a new overtime eligibility test for interstate truck drivers—whether the driver is "based in" Washington. The decision below, if not reversed, would potentially affect the operations of all trucking companies that operate in Washington.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution toward the preparation or submission of this brief. The parties have consented to the filing of this brief; letters of consent have been filed with the Clerk's office. Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae's* intention to file this brief.

The decision's most significant effects, however, would be on companies that, like GTI, are headquartered or have significant operations in Washington and employ potentially "Washington-based" interstate drivers. GTI thus has a direct and substantial interest in the overtime eligibility standard for interstate truck drivers who may be considered "Washington-based."

Food Express, Inc.'s Petition for a Writ of Certiorari (the "Petition") and the Brief of the American Trucking Associations, Inc. and the Washington Trucking Associations as *Amici Curiae* in Support of the Petitioner (the "ATA/WTA Brief") raise and discuss in detail the numerous conflicts in authority implicated by the decision below. GTI desires to bring to the Court's attention certain relevant matters that are referenced but not discussed in the Petition and the ATA/WTA Brief, to wit, the specific ways in which the constitutional and other concerns that Petitioner identifies would manifest in the operations of interstate truckload carriers like GTI.

II. SUMMARY OF ARGUMENT

As explained in the Petition and the ATA/ WTA Brief, the Washington Supreme Court's decision that "Washington-based" interstate truck drivers are subject to the WMWA conflicts with the decisions of various courts, including this Court, with respect to four issues: (1) the extraterritorial application of state law; (2) the preemptive scope of the 1935 Motor Carrier Act ("MCA"); (3) the

application of the so-called *Pike* balancing test, a dormant commerce clause analysis that applies when a state statute burdens interstate commerce; and (4) the preemptive scope of the Federal Aviation Administration Authorization Act ("FAAAA"). MCA preemption and extraterritorial application of the WMWA are thoroughly and correctly analyzed in the Petition and the ATA/WTA Brief. This brief, thus, addresses only (1) the Washington Supreme Court's misapplication of the *Pike* balancing test, and (2) the FAAAA's preemption of the WMWA as interpreted by the Washington Supreme Court in the decision below.

A. Where a state statute incidentally burdens interstate commerce in furtherance of a legitimate local public interest, courts must balance the burdens imposed on interstate commerce against the putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Assuming that the *Pike* balancing test applies in this case,[2] the court below misapplied the test by ignoring the significant burdens that its decision would impose on interstate trucking companies in violation of the dormant commerce clause, and by unreasonably

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[2] In the decision below, the Washington Supreme Court improperly applied the *Pike* balancing test in determining whether application of the WMWA outside of Washington State violates the Commerce Clause of the United States Constitution. Extraterritoriality and the *Pike* balancing test are two separate inquiries. *See* Petition at 9-13; ATA/WTA Brief at 14-15.

positing that local benefits would result from the decision.

A.1. The primary burden that the decision below would impose on interstate commerce is that all interstate motor carriers who provide service in Washington would have the constant burden of analyzing the overtime eligibility of their drivers who operate in Washington to determine whether those drivers were "based in" Washington and, thus, were entitled to overtime under state law. Employers would have to make this determination by applying a vague "choice of law" standard that would permit employees regularly to slip into and out of "Washington-based" status. Dean Prosser has called choice of law a "dismal swamp" in which lawyers and judges frequently become lost. The decision below would require trucking companies to navigate this swamp as often as every week, with respect to numerous drivers, reviewing and attempting to "balance" factors that frequently change for interstate drivers, in an industry with a 130% annual turnover rate. They would face the constant potential for litigation and criminal or civil liability (including personal liability for decisionmakers) should they appear to err in their analysis. This is a significant burden on interstate commerce.

A.2. The burden that the decision below would impose on interstate commerce would far outweigh the supposed local benefit of applying the WMWA to interstate drivers. The court below identified two local purposes of the WMWA: (a) "to

establish minimum standards of employment within the state of Washington," and (b) "to encourage employment opportunities within the state." Petition App. A, at 9a (decision below) (quoting RCW 49.46.0005). Neither of these purposes is plausibly advanced by the decision below.

Far from establishing minimum standards for employment within Washington, the decision below affirmatively permits some employees (those who are not "based in" Washington) to work overtime in Washington with no entitlement to overtime pay under Washington law, while simultaneously requiring overtime pay for other employees (those "based in" Washington) performing the same work almost entirely *outside* of the state.

Moreover, by making "Washington-based" employees more costly and less flexible to employ than employees who are "based" outside of Washington, the decision below would *discourage* employment within Washington. This would occur because of three unique features of the interstate trucking industry, all of which the court below ignored.

First, unlike employees who work in fixed locations, Washington employees cannot practicably be substituted in for interstate truck drivers because, by the time the drivers have worked 40 hours in a workweek (the trigger for overtime pay under the WMWA[3]), they are likely to

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[3] RCW 49.46.130(1).

be hundreds or thousands of miles from Washington.

Second, unlike employers with fixed production or service locations, in which a replacement worker can take over another worker's tools, machines or workstation, every interstate driver requires a tractor-trailer combination in order to do his or her job. Thus, where employers with fixed production or service locations might simply hire more workers in lieu of paying overtime wage rates, the large capital cost inherent in putting an additional interstate driver on the road prevents trucking companies from simply fielding more drivers.

Third, unlike Washington employers whose employees work in fixed locations, interstate trucking companies have obvious alternatives to hiring additional "Washington-based" employees. For example, long-haul truck drivers are inherently mobile. Thus, it would be relatively simple for a multi-state trucking company to rely primarily on drivers "based in" states other than Washington to serve the Washington market. Trucking companies could also rely on owner-operators (independent contractors who own their own equipment and are not subject to the WMWA) or other subcontractors to haul freight primarily into and out of Washington.

For these reasons, the decision below would not encourage employment in Washington. Rather, it would encourage motor carriers to rely on drivers who are presumptively not "Washington-based" employees, and who, therefore, would be less costly

and more flexible to employ as drivers. *Certiorari* should be granted because the decision below misapplies this Court's dormant commerce clause jurisprudence, first by reaching the *Pike* balancing test at all, and alternatively by misapplying the test.

B. *Certiorari* should also be granted to resolve a split in authority regarding the preemptive scope of the FAAAA. The FAAAA preempts state laws that would have a significant effect on the prices, routes or service of trucking companies like GTI. The economics of the interstate trucking industry would leave trucking companies no choice but to respond to the decision below by altering prices, by re-routing drivers, or by reducing service in Washington. As a result, the FAAAA, as interpreted by this Court, preempts the WMWA. The Washington Supreme Court's contrary holding highlights and exacerbates a conflict among federal circuit courts with respect to the continued vitality of this Court's interpretation of FAAAA preemption.

For all of these reasons, *certiorari* should be granted.

III. ARGUMENT

A. The Decision Below Conflicts with This Court's Dormant Commerce Clause Precedents Because It Would Result in Substantial Burdens on Interstate Commerce Without Countervailing Local Benefit.

In *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), this Court held: "Where [a] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." As noted above and discussed in the Petition and the ATA/ WTA Brief, the court below improperly conflated two issues: (1) whether extraterritorial application of the WMWA is permissible, and (2) whether the WMWA fails the *Pike* balancing test. Assuming, however, that the *Pike* balancing test applies, the court below misapplied the test by dismissing the significant burdens that its decision would impose on interstate commerce and by unreasonably positing that local benefits would result from the decision.

1. The Decision Below Would Impose Substantial Burdens on Interstate Commerce.

The primary burden that the decision below would impose on interstate commerce is that all motor carriers who provide services in Washington would have the constant burden of analyzing the

overtime eligibility of their drivers who operate in the state of Washington. As the D.C. Circuit has observed with respect to overtime eligibility, "the practicalities of the situation . . . require a reasonably commonsense rule which can be applied with reasonable simplicity by area businessmen." *Williams v. W.M.A. Transit Co.*, 472 F.2d 1258, 1265 (D.C. Cir. 1972); *cf. Strain v. West Travel, Inc.*, 117 Wn. App. 251, 259, 70 P.3d 158 (2003) (finding wage statute preempted by federal admiralty laws in part because paying each maritime worker "according to the laws of the worker's home state [would be] a nightmarish accounting prospect"). The decision below, however, would require anything but a simple, commonsense inquiry. Rather, it would require ongoing application of a vague "choice of law" standard to overtime eligibility determinations. Petition App. A at 11a n.5, 22a (decision below). Choice of law has famously been described as

> a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.

William Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953). Considerably more lost than courts and lawyers would be *non*-lawyers in the typical trucking company's payroll department

faced with the task of continuously trying to puzzle out the overtime eligibility of interstate truck drivers under a mysterious choice of law standard.

Two real-world scenarios illustrate the problem. Driver A lives in Washington, drives on a Washington driver's license, was hired by GTI's recruiting department in Pacific, Washington, and received orientation at GTI's Medford, Oregon terminal. Driver A receives a dispatch from a driver manager at GTI's Turlock, California terminal. He picks up a tractor licensed in Oregon at GTI's Clackamas, Oregon terminal. He takes a load to California, another load to Utah, and a third load to Washington. He then parks his truck overnight at his home in Washington, and returns the equipment to the Clackamas terminal the next morning.

Driver B lives in Oregon and drives on an Oregon driver's license. She was also hired by the recruiting department in Pacific, Washington, and was oriented in Pacific. Driver B receives a dispatch from the Pacific terminal. She starts her trip from the Clackamas, Oregon terminal in a tractor licensed in Oregon. She picks up her first trailer in Pacific, Washington, and spends the next week running back and forth between Portland, Oregon and British Columbia, spending 90% of her time in Washington.

There is no way for interstate trucking companies to predictably determine the overtime eligibility of these interstate drivers in a given workweek using the vague "choice of law" standard

adopted in the decision below. The Washington Supreme Court itself did not analyze the issue in the decision below. Rather, the court summarily concluded that choice of law principles pointed to Washington as the "base" of the plaintiff below, Larie Bostain. Petition App. A at 2a-3a, 11a. But the facts that the court articulated about Mr. Bostain—and other facts that might or might not bear on the choice of law question—could be present or absent in any number of combinations.

Mr. Bostain, for example, apparently always began and ended his driving runs at, his employer Food Express's Vancouver, Washington terminal. He spent 37% of his working time in Washington. He lived in Washington and held a Washington driver's license. Petition App. A at 2a-3a.

In stark contrast to Mr. Bostain's relatively predictable regional routing, GTI's long-haul drivers roam the continent, picking up and dropping off loads and trailers at locations throughout the United States and Canada. They drive 2,000 or more miles per week in multiple states, for multiple customers, with highly variable and irregular routes. These routes are generally not known prior to—or even at the mid-point of—a given workweek. Shipments may originate at GTI's customers' facilities, terminate at their customers' facilities or a drop lot, and do not necessarily pass through a GTI terminal. A GTI long-haul driver who drove 200 miles in Washington might not drive *another single mile* in

Washington for the rest of three or four applicable pay periods.

Mr. Bostain took his orders from, turned in his time at, and picked up his pay at Food Express's Vancouver, Washington terminal. Petition App. A at 2a-3a. GTI's interstate drivers are, again, quite different. They can and do receive training and work assignments from any of GTI's driver managers, who are located at terminals in five states other than Washington.[4] Drivers may submit their payroll, trip and log book information at any GTI facility or any truck stop within the 48 states. All but a few drivers receive their pay electronically through a ComCard issued by GTI and used nation-wide.

Compounding the difficulty, various potentially relevant factors could change for a particular driver. A GTI driver, for example, might move his residence into or out of Washington at any time, especially along the Washington/Oregon border. A driver who sometimes starts a trip chain out of GTI's Clackamas, Oregon terminal might make two or three consecutive trips out and back from Washington, or one such trip a month, or ten such trips in two months. A driver might initially work mostly with a driver manager outside Washington, but later receive more assignments from a driver manager located in Washington. Many other changes would be possible.

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[4] GTI has two terminals in Oregon, two in California, and one each in Arizona, Utah, Washington and Wisconsin.

GTI's payroll and trips department consists of two supervisors and ten staff people. These twelve non-lawyers could not be expected to keep track of, let alone evaluate the legal significance of, a shifting kaleidoscope of choice of law factors as applied to hundreds of individual drivers in an industry with a 130% annual turnover rate. Thus, even if GTI initially correctly classified a driver as not "Washington-based," the driver might slip into WMWA coverage unnoticed. The driver would then have a claim for damages against both GTI *and the payroll manager* who failed to recognize that the balance of factors had at some point tipped in favor of "Washington-based" status.[5] All interstate trucking companies operating in Washington would face similar problems. In short, the decision below would impose a substantial burden on interstate commerce.

2. The Decision Below Would Not Result in Any Countervailing Local Benefit

Neither of the two local purposes of the WMWA identified by the Washington Supreme Court—"to establish minimum standards of employment within the state of Washington" and "to encourage employment opportunities within the state"[6]—

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[5] *See* RCW 49.52.070 (individual liability for failure to pay wages due pursuant to statute). Failure to pay overtime can also result in criminal penalties. RCW 49.46.100(1).

[6] Petition App. A. at 9a (decision below) (quoting RCW 49.46.0005).

would plausibly be advanced by the court's new overtime rule. For example, far from establishing minimum standards for employment within Washington, the decision below would establish an overtime standard for some employees who, like plaintiff below, work largely *outside* of Washington, while employees doing the same type of work largely *within* Washington (but not "based in" Washington) would work entirely free from the overtime standard.

Moreover, the overtime rule adopted below would *not* encourage employment within Washington. Overtime laws like the WMWA are believed to create additional employment opportunities by making it cheaper to hire additional employees than to pay overtime to existing employees who work more than 40 hours in a workweek (the trigger for overtime pay rates under the WMWA). But this logic does not apply to interstate drivers because interstate drivers do not work in fixed locations in Washington.

A call center or manufacturing facility located in Washington, for example, can send an employee home after the employee works 40-hours in a workweek, and have another local employee report for duty at the first employee's workstation or using the first employee's equipment. In contrast, a Washington-resident interstate driver who reaches his or her 40th hour of work in Wisconsin or New York or Texas cannot simply go home. Rather than earning wages and driving safely within the hours or service limits set by federal

regulations (60 hours per week), the driver would simply be stranded, far from home and family, until a new workweek began.

Nor is there any practical way to send a "Washington-based" employee to replace an idled interstate truck driver, who is likely to be hundreds or thousands of miles from Washington at the 40-hour mark. It would be cost-prohibitive, in both time and fuel, to locate an unoccupied driver and dispatch him or her scores or hundreds of miles to the idled driver. Sending a bobtail tractor[7] to pick up an idled driver's trailer would create an additional problem, to wit, finding a new trailer for the idled driver when his or her next workweek began.

Dispatching replacement drivers *without* equipment is no solution, as GTI's experience retrieving abandoned equipment demonstrates. Drivers occasionally quit abruptly on the road and abandon their trucks. Along the Interstate-5 corridor, GTI can sometimes have one employee shuttle another out to the abandoned equipment (expending fuel and paying both employees for their time). But in many cases, particularly outside the Interstate-5 corridor, GTI has found that the only way to retrieve its equipment is to *fly* another driver out to the location of the abandoned equipment. Either of these practices would be cost-prohibitive and impracticable if done on a regular basis.

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[7] A "bobtail" is a tractor that is not pulling a trailer.

In the interstate trucking context, another disincentive to simply hiring more employees—whether "Washington-based" or not—is the cost of putting a new driver on the road. One cost is the capital cost of equipping the new driver. Unlike in a fixed facility, a replacement driver cannot simply take over another employee's machine or workstation. Rather, putting another driver on the road requires equipping the driver with his or her own tractor-trailer combination, at enormous expense.[8] Another cost particular to the trucking industry is the high cost of legally required hiring processes to which most employees in other industries are not subject. For example, interstate drivers are subject to federally mandated background checks, drug tests, employment verification, and physical examinations over and above GTI's own requirements (such as a driver-qualification test and orientation sessions).

In addition, unlike employers whose employees work in fixed locations, interstate trucking companies have obvious alternatives to hiring additional "Washington-based" employees. GTI, for example, has a terminal in Clackamas, Oregon, which is a short drive from the Washington border. Because long-haul truck drivers are inherently mobile, it would be a relatively simple matter for GTI to rely primarily on drivers who often start trip chains from the Clackamas terminal—and thus are

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[8] A new tractor-trailer combination of the sort employed by GTI costs approximately $144,000.

less likely to be considered "Washington-based" drivers—to haul freight into and out of Washington. Assuming that these drivers were not considered "Washington-based," they would not be entitled to overtime.[9] They could drive for up to 60 hours per week in full compliance with federal safety regulations, increasing their ability to meet the unpredictable, time-sensitive demands of shipping customers. Hiring or assigning work to drivers who are believed to be "based in" (and probably make their homes in) states other than Washington hardly advances the WMWA's goal of increasing employment opportunities within Washington.

Another alternative to relying on "Washington-based" drivers would be for trucking companies to rely more heavily on owner-operators—independent contractors who own their own equipment and are not subject to the WMWA—to haul freight primarily into and out of Washington.[10] Similarly, GTI could refer or subcontract some of its work to out-of-state carriers, whose employment of drivers not "based in" Washington would allow them to perform some work at less cost than GTI could perform it using "Washington-based" drivers. These alternatives, too, would be contrary to the WMWA's goal of

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[9] Oregon does not require overtime for interstate drivers. Or. Admin. Reg. § 839-20-0125(3).

[10] GTI currently contracts with approximately 150 owner-operators.

increasing employment opportunities in Washington.[11]

For GTI to have to refocus its business away from the state of Washington because of the high cost and inflexibility of "Washington-based" drivers would be disappointing to GTI, a family-owned company with deep roots in Washington. The economics and operational realities of the trucking industry, however, would make such changes imperative. Profit margins in the industry run in the three- to five-percent range. Wages and benefits account for approximately 47% of the cost of doing business. Paying overtime up to 60 hours in a workweek increases the cost of labor by more than 16%.[12] A 16% increase in labor costs for "Washington-based" drivers would more than eliminate a trucking company's profits on such drivers' work. In the highly competitive trucking

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[11] Petitioner Food Express would have another option—moving its Vancouver, Washington terminal a few miles across the Oregon border, and dispatching drivers like Mr. Bostain from Oregon. Apart from the impact on drivers, the loss of clerical and mechanical jobs at the Vancouver terminal would further reduce employment opportunities in Washington.

[12] Federal regulations permit interstate drivers to work 60 hours per workweek. Paying time-and-a-half (the WMWA's overtime rate) for hours worked between 40 and 60 in a workweek increases costs by 16% before additional payroll taxes. (At a straight-time rate of $20/hour, 60 hours at straight time is $1,200. Forty hours of straight time plus 20 hours at time-and-a-half ($30/hour) is $1,400, which is 116% of $1,200.)

industry, these costs likely could not be offset with price increases. As a result, the decision below could only cause employment opportunities in Washington to decline, as trucking companies were forced to rely on less costly drivers "based in" states other than Washington.

This Court has recognized that requiring premium pay in an industry characterized by fluctuating hours of employment is a "burden" that Congress, by exempting drivers from the overtime requirements of the federal Fair Labor Standards Act, intended to avoid imposing on interstate carriers. *Southland Gasoline Co. v. Bayley*, 319 U.S. 44, 48 (1943). The Washington Supreme Court's failure to recognize these realities led it to adopt an interpretation of the WMWA that would *discourage* employment within Washington by making "Washington-based" employees more burdensome and expensive to employ than employees who are "based" outside of Washington. The decision would result in no local benefit, let along a local benefit that would outweigh the burdens that it would impose on the interstate trucking industry.

B. The Decision Below Conflicts with This Court's Precedent and the FAAAA Because It Would Have a Significant Effect on Prices, Routes or Service of Interstate Trucking Companies.

The WMWA, as interpreted in the decision below, is preempted by the FAAAA because it would have a "forbidden significant effect" on the

prices, routes or service of interstate motor carriers like GTI. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992).[13]

One way to address the increased labor costs resulting from the decision below would be for employers of "Washington-based" drivers to raise prices for shipping to and from Washington. As noted above, however, the increases would have to be significant to cover the increased costs of paying overtime. Thus, if price increases were feasible, the result would be a "forbidden significant effect" under *Morales*.

More likely, however, out-of-state trucking companies that employ legions of "non-Washington-based" drivers would undercut any pricing changes that employers of "Washington-based" drivers sought to make. Thus, companies like GTI would be forced to resort to options such as relying more heavily on drivers who are more or less clearly "based" in other states.[14] In order to do so, however, GTI would have to alter the ways in which it routes its drivers. Moreover, to ensure that drivers did not slip unnoticed into the vague "Washington-based" category, trucking companies

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[13] Notwithstanding the FAAAA's aviation-related title, the Act also applies to motor carriers. *See* 49 U.S.C. § 14501(c). *Morales* involved preemption under the federal Airline Deregulation Act of 1978 ("ADA"); however, as Petitioner describes, Congress intended the FAAAA to have the same broad preemptive effect as the ADA. Petition at 22.

[14] Smaller employers with no out-of-state terminals or drivers would presumably have to shut their doors.

would be incentivized to minimize the time that their drivers spend in Washington. This might involve, for example, routing trucks along Interstate 84 (an east-west route that runs across much of Oregon just south of the border with Washington), rather than Interstate 90 (which runs east-west though Washington State); routing drivers from GTI's Salt Lake City terminal, rather than a Washington terminal, to serve Eastern Washington and points east; or moving GTI's Spokane, Washington satellite yard across the state line to Post Falls or Coeur D'Alene, Idaho. Motor carriers not headquartered in Washington State would undoubtedly take similar steps. The result would be a significant effect on routes, forbidden under *Morales*.

A final alternative would be for GTI to reduce the services it offers in Washington, largely leaving the field to out-of-state competitors who employ drivers who are presumptively "based in" other states. Again, this would be an extraordinary result, in light of GTI's long history of serving customers in Washington. Yet, providing significant service in Washington while maintaining a headquarters and major terminal operations in Washington would either force GTI to rely heavily on "Washington-based" drivers (an economically untenable option) or leave the company constantly exposed to claims that its drivers are in fact "Washington-based" regardless of the locations of their "home" terminals. Thus, if GTI could not address the effects of the decision

below by altering prices or routes, the company would have to alter its services in order to compete in the interstate trucking market.

In short, the WMWA as interpreted below would *necessarily* significantly affect at least one of the areas forbidden under *Morales* (prices, routes or services of motor carriers in Washington). More likely, it would impact all three areas, significantly altering the complexion of interstate trucking in Washington. Washington State businesses that make or receive interstate shipments by truck—that is, virtually every business in Washington—and out-of-state businesses shipping freight into Washington would bear the burden of higher prices and diminished service. As a result, the WMWA as interpreted below is preempted by the FAAAA. The Washington Supreme Court's contrary holding, for which the Court relied on the Ninth Circuit's decision in *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1187-89 (9th Cir. 1998), places the decision below squarely on the wrong side of a circuit split regarding this Court's applicable preemption precedents. *See* Petition at 23-24; ATA/WTA Brief at 20.

IV. CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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OCTOBER 2007